I. JURISDICTION AND REQUEST FOR RELIEF

In this verified petition, we seek post-conviction relief under art. 11.07 of the Texas Code of Criminal Procedure on behalf of Ernest (Ernie) Lopez. In April 2003, Ernie was convicted in the 181st District Court in and for Potter County, Texas of aggravated sexual assault of a child and sentenced to 60 years imprisonment in a jury trial (Cause No. 44,365-B, The Honorable John Board presiding). The Court of Appeals for the Seventh District of Texas (Amarillo) denied his appeal on August 9, 2005. Capital murder charges arising out of the same circumstances are pending (Cause No. 44,366-B). In this petition, we ask that the conviction for aggravated sexual assault be overturned based on actual innocence and constitutional errors in the trial process.

Since the factual evidence presented at trial was incomplete and the expert testimony was based on factual error and did not accurately represent the medical literature, this petition presents new facts as well as expert affidavits on child sexual assault and shaken baby syndrome. The information in this petition is supported by affidavits and other exhibits. We will also be filing supplemental motions seeking access to the State's files and the child's medical records. Since this case is complex, we request an evidentiary hearing on any disputed issues.

II. CASE SUMMARY

Ernie was convicted of sexually assaulting Isis Vas, age six months, on October 28, 2000, 2½ days after her mother brought her to DeAnn Lopez, Ernie's wife and Isis' daycare provider, covered with sores and bruises of unidentified origin. The State did not contest the existence of the sores and bruises, which have never been explained, but claimed nonetheless that Ernie had sexually assaulted and shaken Isis to death in the 40 minutes between his wife's departure to run a few errands and Ernie's 911 call, placed when Isis stopped breathing and he was unable to resuscitate her.

Isis' medical records have recently been reviewed by Dr. Lloyd White, forensic pathologist and Deputy Medical Examiner for Tarrant County, Texas; Dr. Waney Squier, neuropathologist, Oxford University, England; Dr. Michael Pollanen, Chief Forensic Pathologist for the Province of Ontario, Canada; Dr. Richard Soderstrom, Professor Emeritus, University of Washington Medical School; and Dr. Robert Sunderland, Consulting Paediatrician, Birmingham Trauma Unit and Royal Orthopaedic Hospital, Birmingham, England. Although most of these physicians hold government positions and generally testify for the prosecution, each found in this case that there is no medical evidence connecting Mr. Lopez to any of Isis' injuries. Instead, Isis' medical history, clinical symptoms and laboratory reports suggest that she died from illness, infection or injury arising prior to arrival at the Lopez home, aggravated by dehydration and lack of medical care. Her genital findings are inconsistent with abuse and were likely caused by some combination of her overall medical condition (including a documented bleeding disorder, black tarry stool that went up in the vaginal area, and *candida* diaper rash) and post-admission treatment (including rapid rehydration and an extended sexual assault examination).

To understand Isis' medical condition, it is necessary to have a basic understanding of her history. Isis' parents were Veronica Vas and Bobby Miller, both of whom were medical doctors at Northwest Texas Hospital in Amarillo, Texas. Dr. Vas was an unmarried mother who had three children by two fathers, and at least five pregnancies by four fathers, during her four year residency at Northwest Texas Hospital. Dr. Miller, a married and reportedly alcoholic resident, fathered Isis, Dr. Vas' youngest child, but did not acknowledge her. Since Isis' parents spent little time with her, Isis was largely cared for by babysitters, including Lorrie Word, Pat Turner, and DeAnn Lopez. DeAnn Lopez, one of Dr. Vas' patients, was Isis' primary caretaker

beginning in August 2000. DeAnn and her husband Ernie had two children, both of whom had been delivered by Dr. Vas. Ernie also had an older daughter by a prior relationship.

When DeAnn began caring for the Vas children, Dr. Vas had just completed her residency and was attempting to get out of her commitment to the Navy, which had paid for her education and was expecting her to report for duty in San Antonio. She was also involved in a custody suit with Dr. Douglas Shelton, the father of her two older children. By September, it seemed likely that Dr. Vas would lose custody to Dr. Shelton based on a parenting evaluation that found Dr. Vas to be self-centered and manipulative, and her home to be chaotic and unsanitary. Her former nanny, Lorrie Word, had also reported that Dr. Vas had left Isis unattended at night, soaked in urine, for at least an hour and possibly an entire hospital shift. By September, Dr. Vas had resumed an affair with Dr. Steve Gerstler, who lived in Michigan and had fathered an earlier pregnancy. After visiting Dr. Gerstler in Michigan, Dr. Vas told the babysitters that Dr. Gerstler was the "love of her life" but indicated that she didn't think he would want to take her with her children.

The Lopezes did not see Isis or the older Vas children from approximately October 6-25, 2000. Pat Turner cared for Isis from October 6-9, when the Lopezes were out of town, and Dr. Vas' father, Charles Vas, cared for the children from October 12-25. A pediatrician report on October 12 indicates nutritional concerns but no physical injuries. On the weekend of October 20-23, Dr. Vas left Isis with her father while she visited Dr. Gerstler in Michigan.

When Dr. Vas' father returned to Indiana on Wednesday, October 25, Dr. Vas brought Isis and the two older children to the Lopezes. At that time, Isis was covered with raised red spots on her head and yellowish bruises on her chest, which Dr. Vas attributed to flea or spider bites. In all, there were approximately 22 bruises and/or insect bites on Isis' face and body.

Over the next two days, Isis had a fever, breathing difficulties, and black stool, which is often the result of abdominal injuries. She would not drink formula, taking a total of 4-6 ounces of juice with Tylenol or ibuprofen over the next 2½ days. Dr. Vas did not take Isis to a doctor or emergency room for fear that she would be accused of abusing her. Instead, she treated Isis herself, telling DeAnn to give her over-the-counter painkillers and decongestants as well as antibiotics and breathing treatments prescribed for the Lopez children. During this period, Dr. Vas slept at night on the Lopez' living room floor, as was her custom.

On Friday, October 27, Dr. Vas planned to leave again to see Dr. Gertsler in Michigan. However, DeAnn and her husband, Ernie, were concerned about Isis. Ernie asked his supervisors at Hand Industrial for advice, and DeAnn asked Dr. Vas to check on Isis before she left. After stopping by the house briefly, Dr. Vas said that Isis would be fine and left for Michigan without leaving a note authorizing medical care for Isis, as requested.

Sometime during the night, Isis fell off the couch, where she was sleeping, possibly hitting her head on a carseat. On Saturday morning, DeAnn left at 10:15 to run a few errands, taking two of the children with her. When Dr. Vas phoned at 10:36, Ernie told her that Isis was still having breathing difficulties. About fifteen minutes later, Ernie found Isis limp and unresponsive, with no signs of breathing. Ernie attempted to revive her, started CPR and called 911, continuing CPR until the emergency vehicles arrived. The 911 call was placed at 10:55.

On arrival at Northwest Texas Hospital, the emergency room (E.R.) personnel concluded almost immediately that Ernie must have raped Isis and shaken her to death while his wife ran errands. In deciding that Ernie had assaulted Isis, they ignored the bruises that occurred while in her mother's and grandfather's care; Isis' symptoms in the days before her death (including fever, black stool and failure to eat); Dr. Vas' refusal to provide medical care; and the highly

abnormal laboratory reports, which showed infection and a bleeding disorder, among other things. They also ignored Dr. Vas' poor judgment and negligent care of her children, which were well-known at the hospital. Based on the judgment of the E.R. personnel, Ernie was arrested at the hospital within hours of Isis' hospital admission.

The autopsy report from the Dallas Medical Examiner's Office concluded that Isis died from blunt force injuries. The report noted the bruises, a laceration on the posterior fourchette (part of the external genitalia) and several small brain hemorrhages. At trial counsel's request, Dr. Lloyd White, the Medical Examiner for Corpus Christi, reviewed the autopsy report, as well as a time line and witness statements. Based on this review, he concluded that it was not possible based on the available information to determine the nature of Isis' injuries or illness, who caused the injuries, or when they occurred. He further noted that there was no medical or scientific basis for the timing estimates of the E.R. personnel, who were claiming that the injuries occurred within two hours of hospital admission. Ernie's trial counsel did not retain Dr. White or obtain the medical records that would have been necessary to determine the cause and timing of the injuries.

In April 2003, Ernie was convicted of sexually assaulting Isis based solely on the testimony of the E.R. personnel, who testified (incorrectly) that Isis' genital findings could only have been caused by forceful penetration within an hour of hospital admission. In fact, these findings have many possible causes, including infection, bleeding disorders, and various hospital procedures, including rehydration and a sexual assault examination, all of which were present here. There is, moreover, no medical or scientific basis for the testimony of the E.R. personnel that the genital bleeding (which was about the size of a split pea) occurred within an hour of hospital admission, nor is it possible to distinguish between pre- and post-admission bleeding.

Ernie's defense counsel, however, did not raise these issues. They did not present any experts on sexual assault or timing, and the Court excluded evidence on Dr. Vas' history of poor judgment and negligent childcare, including a CPS finding of medical neglect. A 2002 claim by Dr. Vas' oldest child that he had been mistreated and sexually abused by Dr. Vas' father was also excluded. Based solely on the undisputed testimony of the E.R. personnel, a very divided jury – initially split 8 for innocence and 4 for guilt – found Ernie to be guilty of sexual assault.

In the punishment phase, the E.R. doctor testified that Ernie had shaken Isis to death within an hour of hospital admission and had also caused her old bruises – an impossibility since Isis was not with the Lopezes when the bruises occurred. The pathologist, on the other hand, testified that Isis died of blunt force injuries and that the bruises and hemorrhages had all occurred within approximately 24 hours of death – also an impossibility since the bruises were by then at least 4 to 6 days old. Moreover, since Isis had been in the hospital for more than 40 hours after death, the pathologist's timing estimate suggests that the hemorrhages occurred in the hospital. Since Ernie's counsel did not present any experts on brain injuries or timing or point out the discrepancies in the testimony of the State's experts, the jury assessed Ernie 60 years confinement on the sexual assault charge. Capital charges for the baby's death are pending.

Ernie's appeal was denied by the Court of Appeals on August 9, 2005. In its decision, the Court seemed perturbed by the evidence that the child was ill and bruised prior to being in Ernie's care and that Dr. Vas refused to get medical treatment for fear of being accused of abuse. However, the Court could not find legal or factual insufficiency of the evidence given the undisputed testimony of the E.R. personnel that the child had been raped and murdered within an hour of arrival at the emergency room. Nor could the Court find that Ernie's counsel was ineffective for failing to call Dr. White since there was no evidence in the record that Dr. White's

testimony would have been favorable to Ernie. Dr. White's initial report, which was not in the record, and his more recent affidavit, prepared on a *pro bono* basis, establishes that his testimony would indeed have been favorable. In fact, it would have essentially destroyed the State's case.

III. HABEAS ISSUES

This habeas petition is based on actual innocence. As in other false conviction cases, the incorrect verdict resulted from improper expert testimony and numerous errors in the trial process. Of these, the most striking were: (1) erroneous medical evidence; (2) ineffective assistance of counsel; and (3) a blind focus investigation in which the medical personnel and the State ignored all possibilities other than sexual assault and murder by Ernie.

A. Erroneous Medical Evidence.

Ernie was convicted based on the testimony of the E.R. personnel that photographs taken during a sexual assault examination showed "injuries" that could only be caused by forceful penetration. The photographs initially show a small, split-pea size drop of blood on the posterior fourchette (the area that lies just inside the outer lips, before the hymen and vagina), and then further disruption on the posterior fourchette as a nurse prods the area during a 1 ½ hour sexual assault examination. There was no external blood, no injury to the child's inner thighs or the outer lips of the genital opening and no injury to the vagina (the area behind the hymen). The photographs show that the hymen was intact. A rape examination kit showed no sperm, pubic hairs or any other signs of assault, sexual or otherwise.

In the punishment phase, the E.R. doctor mentioned blunt force injuries (the autopsy finding) but testified that Isis died of violent shaking, with a force equivalent to a motor vehicle accident or fall from a two-story building. This diagnosis was initially made solely on the basis of retinal hemorrhages, which have many natural causes. The E.R. doctor also testified that a

hospital CT scan later confirmed a subdural hemorrhage. This is not, however, referenced in the hospital notes, and the records of the CT scan have not been made available.

The pathologist testified that Isis died from blunt force injuries to the head, possibly combined with shaking, as evidenced by the bruises (which were old) and small brain hemorrhages. She also testified that the bruises as well as the brain and genital hemorrhages had occurred within 24 hours of death. Since Isis was on life support for 30 hours, this would mean that the bruises and hemorrhages occurred after hospital admission – which is likely for the hemorrhages but impossible for the bruises, which are recorded as brown on the emergency personnel and hospital records. As the medical experts supporting this petition have noted, the pathologist was likely misled by the color of the bruises, which had apparently bled after hospital admission due to hospital procedures and a documented bleeding disorder.

1. Sexual Assault. In diagnosing sexual assault, the E.R. personnel misstated the medical literature. Research conducted in the late 1980s and early 1990s established that unabused children, particularly children with a history of vaginal infections, have genital findings virtually identical to children who have been (or were thought to have been) sexually abused, and that sexual assault can only be definitively established by the presence of sperm. *See, e.g.,* Sexual Assault Nurse Examiner (SANE) Protocols, Ex. 114 at 103. Bleeding or lacerations on the posterior fourchette are nonspecific findings that may be caused by a wide range of conditions, including urinary tract infection, inflammation, infection, cleaning, bleeding disorders, accident, or the sexual assault exam itself – all of which were present in this case. The E.R. personnel at Northwest Texas Hospital did not conduct the medical evaluation of the child's symptoms, medical history and laboratory results that is needed to assess and eliminate the most common causes of genital bleeding. *See, e.g.,* Ex. 125 at 256-257 (describing review of systems

necessary in child sexual abuse evaluation). In addition, they ignored the absence of external injury to the child's genitalia and hymen, findings that virtually preclude sexual assault. *See, e.g.,* Aff. of Dr. Richard Soderstrom, Ex. 2.

In diagnosing sexual assault, the E.R. nurses also violated the Texas Nursing Practice Act, which explicitly prohibits nurses from making diagnoses. Ex. 165, TEX. OCC. CODE ANN. § 301.002(2) (Vernon 2003). In this case, a proper diagnosis required a determination of whether the bleeding in various parts of the body resulted from trauma or natural causes, as well as whether such bleeding was traumatic, secondary to another illness or disease, or resulted from hospital treatment. Unfortunately, the nurses' improper diagnoses in this case were echoed by an E.R. doctor who was unfamiliar with the literature on child sexual assault, did not conduct an independent evaluation, and simply repeated whatever the nurses said.

At trial, the E.R. personnel stepped even further outside their area of expertise when they attempted to "time" the illness or injury causing the bleeding to within an hour of hospital admission, i.e., the precise period in which Ernie was caring for the child. *There is no medical basis for such timing.* By using various stains and looking for iron or inflammatory responses, a pathologist may be able to determine that bleeding is more than 24-48 hours old. However, it is not always possible to determine whether the bleeding is *under* 48 hours old, and it is certainly not possible to time the original injury or condition to a period of hours, let alone minutes (as suggested by the E.R. personnel at trial). It is also impossible to distinguish from a medical perspective between small amounts of bleeding that occurred *before* hospital admission and small amounts of bleeding that occurred *after* hospital admission, typically as a result of CPR, rehydration or (in this case) an extended sexual assault examination. Unfortunately, since the E.R. personnel had no medical basis for their conclusions, they were free to change their

testimony as often as they liked, which they did – not just once, but repeatedly throughout the trial.

2. Shaken Baby Syndrome. Within two hours of hospital admission, the E.R. staff had also diagnosed "shaken baby syndrome." Shaken baby syndrome (SBS) is essentially a diagnosis – or, more precisely, a theory – that rests largely on exclusion: under this theory, if a healthy child dies without explanation or skull fractures, but with subdural and retinal hemorrhages, the child must have been shaken to death. As discussed below, this theory is not evidence-based and most aspects have been disproven by the research literature. As a result of such research, the English courts rejected the "triad" of SBS symptoms – subdural hemorrhage, retinal hemorrhage and brain swelling – as diagnostic of SBS in July 2005, and we expect that the U.S. courts will eventually follow suit. We therefore include a challenge to shaken baby syndrome in this petition, while noting that the theory remains popular in the child abuse literature. Aff. of Dr. Lloyd White, Ex. 1 at ¶ 110.

Even if shaken baby syndrome were a valid syndrome, the E.R. personnel did not have grounds for diagnosing it in this case. First, Isis was not a healthy child: in the days prior to death, she was bruised from head to toe, bitten multiple times by spiders (according to her mother, a medical doctor), and had numerous signs of serious illness, including black stool. In the preceding months, Isis also had symptoms of illness, including general irritability and weight loss and/or failure to gain weight. Second, the E.R. personnel had no basis for diagnosing "shaken baby syndrome" shortly after hospital admission. At minimum, this diagnosis requires retinal and subdural hemorrhages. While the E.R. doctor claimed to have noticed retinal hemorrhages on admission, it was not possible to determine the existence of a subdural hemorrhage until a CT scan was taken, which was not done until much later. The results of the

CT scan are not yet available. While a small, thin hemorrhage in the subdural space was confirmed at autopsy, this hemorrhage may not be a subdural hemorrhage at all. Instead, this hemorrhage is consistent with leakage from the dural veins (rather than a tearing of the bridging veins in the subdural space), a finding that has never been associated with trauma. The hemorrhage was in any event too small to cause death and may have been caused by hospital treatment, including rehydration. At trial, the E.R. doctor also testified that Ernie must have caused Isis' old bruises, ignoring the fact that the bruises occurred while Isis was in her mother and grandfather's care.

The pathologist who conducted the autopsy did not diagnose "shaken baby syndrome" but instead concluded that Isis died of multiple blunt force injuries, as shown by the contusions and various small hemorrhages. While the pathologist was misinformed on the timing of the bruises, the pathologist's findings on the cause of death were exculpatory: if Isis died of blunt force impacts, as evidenced by the contusions identified in the hospital and at autopsy, the injuries occurred while she was in her mother's and grandfather's care, not in Ernie's care. Similarly, if the brain and genital hemorrhages occurred within approximately 24 hours of death, these hemorrhages are post-admission artifacts occurring when Isis was in the care of the medical personnel, not in Ernie's care.

Once the E.R. personnel diagnosed sexual abuse and shaken baby syndrome, they did not consider any other possible causes for the child's death. Thus, they ignored the laboratory reports, which suggested several natural disease processes, as well as the clinical history, which confirmed dehydration and lack of appropriate medical care. Even the pathologist was not told that the child's bruises were present several days before hospital admission or that their origin was in dispute. Thus, so far as we can determine, no effort was made at autopsy to determine the

nature, timing or cause of these marks. Without this evaluation, it is not possible to determine the cause of the child's death.

3. Proper Diagnosis. We have attached reviews of the medical testimony by five independent experts, each of whom has provided an opinion on a *pro bono* basis. The reviewing physicians include State, national and international experts in the area of forensic pathology and child sexual assault. As their affidavits indicate, diagnosing and timing Isis' injuries as well as determining the cause of death is considerably more complex than the E.R. personnel realized. Since these affidavits provide considerable insight into these complexities, they should be read in their entirety. *See* White Aff., Ex. 1; Soderstrom Aff., Ex. 2; Aff. of Dr. Waney Squier, Ex. 3; Aff. of Dr. Robert Sunderland, Ex. 4; and Aff. of Dr. Michael Pollanen, Ex. 5. Since these physicians represent a variety of specialties, their perspectives and insights differ – but their ultimate conclusions are the same as Dr. White's initial conclusion: there is no medical evidence linking Ernie to Isis' injuries, nor is there any medical or scientific rationale for timing the injuries in the manner suggested by the E.R. personnel. Instead, there is abundant evidence that these injuries were attributable to other causes. As the affidavits make clear, Isis was a very sick child in the days prior to hospital admission, and her death most likely resulted from illness, infection or injuries occurring prior to arrival at the Lopez home, aggravated by dehydration and inadequate medical care, with secondary bleeding in various parts of her body, exacerbated by a bleeding disorder and various hospital procedures.

a. Dr. Lloyd White. Dr. White, a forensic pathologist, is the Deputy Medical Examiner for Tarrant County (Fort Worth), Texas. He has been involved in a number of high-profile cases, including the LaCresha Murray case, in which an 11 year old girl was falsely convicted of killing a younger child based on an incorrect timing of injury. After reviewing the

additional medical records, Dr. White concludes that there is no medical evidence suggesting that Ernie harmed Isis Vas. White Aff., Ex. 1 at ¶¶ 17, 127. Dr. White expresses particular concern that the investigation was inadequate (¶¶ 94-100) and that the district attorney and medical experts who testified at trial did not consider – and in some instances explicitly ignored – the basic facts surrounding the child's death, including the mother's possible culpability, the lab reports, the pre-existing bruising, and the child's symptoms in the days before death. *Id.* at ¶¶ 18, 35-39, 42-44. Dr. White notes there is no medical or scientific basis for the testimony of the E.R. personnel that the bleeding and/or injuries occurred within an hour of hospital admission, for forensic science does not permit this degree of precision. *Id.* at ¶¶ 27, 66-67, 77-79, 117. No effort appeared to have been made, moreover, to distinguish between pre- and post-admission bleeding, a particular concern in this case given the bleeding disorder documented in the laboratory reports shortly after hospital admission. *Id.* at ¶ 26, 67, 72. Dr. White further points out that the medical record contains evidence of illness prior to death (¶¶ 50-53), abnormal laboratory reports showing a bleeding disorder and infection (¶¶ 58-60), neglect and possible abuse by the mother (¶¶ 45-49), and the possibility of artifacts caused by hospital treatment (¶¶ 61-62), none of which are addressed in the autopsy report or medical testimony. The medical testimony also ignored numerous nontraumatic causes for the genital findings (¶¶ 104-108), retinal hemorrhages (¶¶ 68-70), and brain hemorrhages (¶¶ 63-64). A more precise determination of the nature of the injuries and cause of death would require complete review of the medical records, most of which are not available at this time. *See, e.g., Id.* at ¶¶ 11, 29, 88, 92 (identifying the records needed and factors to be considered in forensic review). Based on the presently available record, Dr. White does not rule out the possibility that Isis died of blunt force injuries occurring while in her mother's and grandfather's care, but concludes that it is also

possible that she died of natural causes, such as sepsis (infection) or pneumonia, compounded by dehydration and inadequate medical care. *Id.* at ¶ 127.

b. Dr. Richard Soderstrom. Dr. Soderstrom, Clinical Professor Emeritus, University of Washington Medical School and former Gynecology Consultant, Children's Hospital, Seattle, Washington, is the author of a leading article on proper photographic techniques in child sexual assault examinations. Dr. Soderstrom reviews the history of the child sexual assault literature, which identifies numerous nontraumatic causes of the type of genital findings at issue in this case. Soderstrom Aff., Ex. 2 at ¶¶ 7-17 (differential, or alternative, diagnoses include diaper rash, infection, and accidental injury unrelated to sexual abuse). Dr. Soderstrom also reviews the photographs taken at the sexual assault examination. Dr. Soderstrom notes that the initial photographs are inconsistent with sexual assault since there are no injuries to the inner thighs or outer genital area, as one would expect in an examination occurring within a few hours of an assault, particularly on a child victim. *Id.* at ¶ 19. Subsequent photographs show a small amount of blood (about the size of a split pea) of unidentified origin on the posterior fourchette. *Id.* at ¶¶ 20-21. These photographs show no injuries to the external genitalia, including the labia major, and an intact hymen, with no tears or lacerations. *Id.* at ¶ 21. Later photographs show that the use of a Q-tip is stirring up the blood in the posterior fourchette and that the tissue is being stretched, but there are no signs of abuse, such as inappropriate coloration or hematomas. *Id.* at ¶ 22. Dr. Soderstrom observes that it is hard to imagine a type of sexual assault that would cause the bleeding portrayed in the photographs without injuring the outer genitalia or hymen. *Id.* at ¶ 23. The attempted insertion of a foley catheter, however, or the sexual assault examination itself, may cause or aggravate bleeding in this area. *Id.* at ¶ 24. The photographs of the anal area show no sign of force, as one would expect if the sexual assault examination were conducted within a

few hours of the assault, but instead suggests diarrhea and/or diaper rash, possibly aggravated by wiping stool from this area. *Id.* at ¶ 25.

Dr. Soderstrom also reviewed the medical testimony of the trial witnesses and the laboratory reports. He finds that the testimony of the trial witnesses is inconsistent with the medical research and literature. In particular, the trial witnesses were apparently unfamiliar with the research on child sexual abuse and infant genitalia, the range of genital and anal findings in normal children, the alternative diagnoses for various genital and anal findings, or the classification systems commonly used in evaluating child sexual abuse. *Id.* at ¶ 28. The lab reports indicate that the child had a bleeding disorder at the time of the sexual assault examination, while the clinical history suggests the possibility of illness and possible urinary tract infection. *Id.* at ¶¶ 30-31. In conclusion, Dr. Soderstrom states that the sexual assault photographs do not suggest sexual abuse and that the absence of injury to the inner thighs, labia majora or hymen are inconsistent with abuse; that the source of the original blood clot cannot be determined from the photographs; and that any determination of the cause of the genital bleeding and/or death will need to consider the clinical signs of illness as well as the laboratory reports, which confirm a serious bleeding disorder shortly after hospital admission. *Id.* at ¶¶ 33-34.

c. Dr. Waney Squier. Dr. Squier is a Consultant Neuropathologist at Oxford Radcliffe Hospitals and an Honorary Clinical Lecturer at the University of Oxford, Oxford, England. She has a particular concentration in the neuropathology of sudden unexpected death in infancy and is the editor of *Acquired Damage to the Developing Brain* (2002). After reviewing the autopsy report and other materials, Dr. Squier concludes that it is not possible to determine the cause of death based on the materials provided. Squier Aff., Ex. 3 at ¶ 5. She notes, however, that these materials suggest the presence of several natural disease processes. In

addition to caretaker reports indicating that the child was ill and likely suffering from dehydration and melena (black stool, often caused by disorders of blood clotting) for several days prior to hospital admission, laboratory tests taken shortly after hospital admission indicate a serious clotting disorder and other abnormalities, including clinical dehydration and possible liver failure. *Id.* at ¶ 5. Dr. Squier expresses concern with the very prolonged prothrombin time (bleeding disorder) indicated in the laboratory reports since this may be secondary to severe illness and contribute to bruising and melena. *Id.* at ¶ 13.

In reviewing the brain pathology, Dr. Squier notes that the "triad" of subdural hemorrhage, retinal hemorrhage and brain swelling are not specific to shaken baby syndrome and may also have nontraumatic causes, including infections (such as meningitis), dehydration, and hypoxia/ischemia (lack of oxygen or blood supply to the brain). Thus, from a medical perspective, a diagnosis of abuse requires a detailed clinical, pathological and neuropathological evaluation and exclusion of other possible causes. *Id.* at ¶ 31. Dr. Squier notes that the subdural hemorrhage described at autopsy is not of the type generally associated with abuse and may represent leakage from the dural veins (which is associated in infants with infections), dehydration, disturbances of coagulation, metabolic disorders, nutritional deficiencies and the like, rather than trauma. *Id.* at ¶¶ 32-34. Dr. Squier also notes that retinal hemorrhages have many natural as well as traumatic causes, such as brain swelling and increased intracranial pressure, and are not an independent indicator of trauma or abuse. *Id.* at ¶ 38. The brain swelling noted at autopsy is a non-specific finding that may be caused by natural disease processes, such as lack of oxygen or infection, or hospital treatment, including rehydration. *Id.* at ¶ 39. In conclusion, Dr. Squier notes that when presented with the "triad" of subdural hemorrhages, retinal hemorrhages and brain swelling, one must exclude impact injuries; natural

disease processes, including clotting disorders; hypoxia-ischemia (i.e., lack of oxygen or blood supply to the brain); and other causes, such as genetics and unknowns, before considering shaken baby syndrome or other theoretical forms of nonaccidental trauma. *Id.* at ¶ 40.

In this case, there are many indicators of pre-existing trauma and natural disease processes. *Id.* at ¶ 42 (natural disease processes, including infection, dehydration, a clotting disorder and severe metabolic disturbance); *Id.* at ¶ 43 (hypoxia/ischemia, indicated by respiratory difficulties and choking on feed); *Id.* at ¶ 48 (caretaker reports suggesting impact injuries, abusive or accidental, occurring 5 days prior to hospital admission); *Id.* at ¶¶ 49-50 (hospital records suggesting pre-existing dehydration and clotting disorder).

Given these indicators, one cannot exclude the possibility of neglect or abuse prior to arrival at the babysitters followed by inappropriate medical care. Nor can one exclude natural disease processes, including infection, dehydration and a clotting disorder, possibly aggravated by pre-existing neglect or abuse and inadequate medical care. *Id.* at ¶¶ 54-55. Since there is evidence of many possible causes of death, Dr. Squier recommends that a more specific cause be sought and that the brain scans, detailed autopsy notes, photographs, neuropathology reports and brain slides be reviewed or re-evaluated in light of the child's medical condition, history and lab results. *Id.* at ¶ 56.

d. Dr. Robert Sunderland. Dr. Sunderland is a Consultant Pediatrician to the Trauma Unit at the Royal Birmingham Orthopaedic Hospital, Birmingham, England with a specialty in child mortality and numerous publications in international journals. Dr. Sunderland notes that the laboratory reports taken shortly after hospital admission show a child with deranged chemistry, including metabolic acidosis, deranged liver function, and seriously deranged (*i.e.,* out-of-control) coagulation. Dr. Sunderland is not aware of such markedly

abnormal results in a child who was allegedly normal two hours before the samples were taken; instead, it is his understanding that such deranged liver functions require a serious illness of days or weeks. Sunderland Aff., Ex. 4 at ¶ 6. Dr. Sunderland indicates that the black stool noted by the caretakers is a probable consequence of deranged coagulation but could follow a blow to the abdomen. *Id.* at ¶ 7. The laboratory reports also confirm dehydration. *Id.* at ¶ 8. Dr. Sunderland expresses some concern that the medical records he reviewed do not discuss the abnormal chemistry and coagulopathy. *Id.* at ¶¶ 8-9.

Dr. Sunderland notes that the bruises observed by the caretakers may have resulted from assault. However, given the deranged coagulation, they could also result from post-bite "staining." Dr. Sunderland cautions that given the child's deranged coagulation, skin bruising or bowel bleeding should be interpreted with extreme caution. *Id.* at ¶ 10. While timing bruises based on color is an imprecise art that can be misleading, brown bruises are typically 10-14 days old, indicating that the bruises observed shortly after hospital admission were old bruises, with the color change noted at autopsy most likely a consequence of deranged coagulation. *Id.* at ¶ 11.

Dr. Sunderland notes that he has seen splitting of the damp friable (*i.e.,* prone to bleed) tissue in the posterior fourchette of sick infants during medical examination and that the fresh bleeding suggests that the tear in the posterior fourchette occurred post-admission. *Id.* at ¶ 12. Like Dr. Soderstrom, Dr. Sunderland finds sexual assault unlikely given the lack of injury to the hymen or vagina (i.e., the area behind the hymen). Given the seriously deranged blood clotting, one would also expect extensive hemorrhage had such an assault occurred. *Id.*

Dr. Sunderland indicates that the subdural hemorrhage is consistent with an impact to the back of the head, including a fall from the couch the previous night, or shaking, though he

describes this area as contentious. ¶ 13. Dr. Sunderland expresses concern with the inconsistent histories provided by Dr. Vas and finds the lack of injuries to other children in the Lopez home, and a psychological assessment deeming Mr. Lopez to be normal, to be significant.

In general, Dr. Sunderland indicates that the available information indicates that Isis was ill before she came to the Lopez home, with marks on her face that could be finger-tip/knuckle marks from injuries sustained prior to arrival at the Lopez home or resolving insect bites. If the marks are insect bites, Dr. Sunderland suggests that the deranged coagulation could arise from insect venom, leading to easy bruising, bowel and brain hemorrhage, with dehydration and ultimately irreversible brain damage. *Id.* at ¶ 15. Dr. Sunderland notes that the lab reports are not consistent with a healthy child some two hours before the blood was taken, but are instead consistent with the history of a sick child, with the liver tests suggesting neglect of a childhood infection, inappropriate diet, assault some days earlier, some insect toxin/venom, or similar cause. *Id.* at ¶¶ 16-17.

e. Dr. Michael Pollanen. Dr. Pollanen is the Chief Forensic Pathologist for the Province of Ontario, Canada. He is internationally known for his participation in high profile forensic pathology investigations, including autopsies in East Timor, Cambodia, and Central Asia. Dr. Pollanen describes the retrospective pathological review of wrongful convictions, particularly in cases involving homicidal deaths in infants and children, that is now ongoing in Canada. Pollanen Aff., Ex. 5 at ¶¶ 8-10. Such reviews, which are based on evidence-based medicine and primary evidence, have found basic errors in cases involving anogenital injuries and retinal hemorrhages in children. *Id.* at ¶¶ 15, 18. Dr. Pollanen points out that the record in this case contains factual contradictions to the finding of anogenital injury caused by sexual assault; the timing by clinical findings and histology; and the shaking injury. Dr. Pollanen points

out that there is a major contradiction in the factual basis for concluding that a sexual assault occurred at all given Dr. Soderstrom's review and findings, which are contrary to the conclusions provided by Nurse Gorday. If Dr. Soderstrom is correct, the conviction may have been based on a fundamental misunderstanding of the medical evidence. Dr. Pollanen suggests that a retrospective pathological review of the evidence may help determine the nature of the trauma shown in the sexual assault photographs by identifying the nature of the laceration and/or disruptions as well as the possibility of systemic or genital inflammation or infection. *Id.* at ¶ 44. If this review cannot determine the cause of the trauma, a determination of the probable cause of the anogenital findings will rest on a clinical review of the child's medical history, laboratory results, and the evidence-based medical literature on sexual assault. *Id.* at ¶ 45.

Dr. Pollanen also addresses the timing testimony provided by the E.R. nurses and Dr. Levy, who testified that the anogenital injuries occurred within an hour prior to hospital admission. Dr. Pollanen states that "[t]here is no known method that would allow any nurse, clinician or pathologist to narrow the timeframe to such an interval with any degree of certainty. In my view, Nurse Gorday and Dr. Levy do not appear to understand the subtleties involved in the forensic pathology of the timing of injury, indeed, neither is a pathologist." *Id.* at ¶ 47. The same considerations apply to the timing of the retinal and brain hemorrhages. Dr. Pollanen describes acceptable ways of timing injuries, but cautions that these are imperfect methodologies and should be viewed as providing guidelines. *Id.* at ¶ 51. Pathology cannot, moreover, differentiate between different types of "recent" injuries, such as injuries occurring shortly before hospital admission and injuries occurring shortly after hospital admission. *Id.* In this case, if Dr. McClain's testimony that the hemorrhages occurred within 24 hours of death is correct, the hemorrhages occurred after hospital admission, which preceded death by some 43

hours. *Id.* at ¶ 48. Since it is not possible to isolate any of the injuries or hemorrhages to the hour in which Mr. Lopez cared for the child, Dr. Pollanen urges that the primary pathological evidence be reviewed to consider all possible causes of death and to attempt to determine a relative timeline for the various contusions and hemorrhages. *Id.* at ¶¶ 57-61 (noting that the criminal justice is harmed if the factual foundation of a case is wrong). Dr. Pollanen provides a list of the evidence that would have to be examined to perform a methodologically-valid and evidence-based review of Isis' death. *Id.* at ¶ 63.

f. Dr. Elizabeth Johnson. Dr. Elizabeth Johnson is a forensic scientist specializing in DNA analysis. Dr. Johnson was present during the testimony of the State's DNA experts and assisted Ernie's trial counsel in preparing questions, but did not testify since the State's experts confirmed that the DNA evidence on Ernie's clothing was consistent with transference and/or ordinary childcare. Aff. of Dr. Elizabeth Johnson, Ex. 6 at ¶¶ 10-11. Dr. Johnson confirms that the very small amount of Isis' DNA on one cutting of Ernie's underwear is completely consistent with his contact with her as a caregiver since one expects to find some amount of a child's DNA on the caregiver, including underwear, since people may touch their own underwear while having their own DNA (and the DNA of others) on their hands. In this case, the serology reports and DNA results are consistent with what one expects to find during the normal course of childcare contact, and in fact, much larger quantities of a child's DNA could be found on a caregiver through normal contact. *Id.* at ¶ 11; *see also id.* at ¶ 10 (finding low level of DNA on underwear not at all unusual since Mr. Lopez was involved in caring for the child; DNA may have come from many sources, such as the child's tears, saliva, urine or feces and could easily have been transferred from Mr. Lopez' hands to his clothing after a diaper change, feeding or resuscitation; testing techniques in this case were extremely sensitive and would have detected

DNA from as few as 30 cells). At trial, the State's DNA experts agreed that it was not surprising to find this quantity of DNA on a caretaker's clothing since such a deposit may come from skin cells, sneezing, phlegm, urine or feces, with transference common. *Id.* at ¶¶ 15-17.

Dr. Johnson has reviewed the prosecutors' closing arguments, in which the prosecutors indicated that finding a child's DNA on the defendant's underwear would be extremely coincidental in light of the allegations of sexual assault, thus implying a causal connection between the presence of the DNA and a sexual assault. *Id.*. Dr. Johnson states that this assessment of the evidence was incorrect. *Id.* As she thought the State's witnesses made clear, the DNA result in this case was not at all inconsistent with Mr. Lopez' role as a caregiver for the child, and was not evidence of sexual assault or other impropriety. *Id.* The prosecutor failed, moreover, to mention that the child's DNA readings were less than 10% as strong as the DNA readings from an unidentified person (not presumed to be sexually assaulted) – possibly one of the police officers who handled the clothing or who used the same hospital restroom as Mr. Lopez – further confirming that the very low level of the child's DNA is consistent with childcare and/or transference, not sexual assault. *Id.* at ¶¶ 8-9, 17.

B. <u>Blind Focus Investigation</u>.

Based on the diagnoses of the E.R. personnel, Ernie was arrested shortly after Isis' arrival at the hospital. Within days, the State had filed a Complaint that alleged aggravated sexual assault and further stated that Isis' injuries could only be caused by physical abuse, such as violent shaking. Ex**.** 62. From that point on, one mistake led to another. Instead of investigating the facts, the State ignored the established investigatory protocols for child fatality cases, which make clear that: (1) it is difficult to distinguish between natural death and homicide; (2) death from head injuries or physical abuse is often delayed; and (3) a proper investigation requires a

comprehensive review of all medical records, including birth records and CT scans, other physical evidence, and family dynamics. *See, e.g.,* Aff. of Professor Harry Hueston, Ex. 10(b), (U.S. Dept. of Justice protocol for investigating child fatalities); *see also* Hueston Aff., Ex. 10(c), (U.S. Dept. of Justice protocol for investigating child abuse, requiring careful examination of the child's family history, environmental factors in the home, parents' marital status and stress levels, delays in obtaining treatment, and location, cause and configuration of any bruising) and White Aff., Ex. 1 at ¶ 94 (specifying inadequacies in investigation).

In this case, even the most minimal investigation would have determined that Isis arrived at the Lopez home covered with bruises and/or sores and was seriously ill for several days prior to arriving at the Lopez home or hospital admission. Such an investigation would also have found that Dr. Vas' home was unsanitary and that she had a reputation for poor judgment and neglect of her children. Since Dr. Vas had just completed her residency at Northwest Texas Hospital, it is likely that the E.R. personnel who diagnosed her daughter were already aware of these problems but chose to ignore them. The medical personnel, police and District Attorney's office also ignored the 22 bruises and contusions occurring while in her mother and/or grandfather's care; a parenting evaluation that found Dr. Vas to be "manipulative" and "self-centered" and described her home in unflattering terms; a CPS finding that Dr. Vas had failed to provide medical care for Isis and appropriate supervision for all three children; and a family court order transferring custody of the two older children to their father, Dr. Shelton, and limiting Dr. Vas to supervised visitation until she could pass psychological tests. Dr. Vas' behavior did not, moreover, improve after her daughter's death: at a hospital staff party five weeks after Isis' death, Dr. Vas danced provocatively with her new boyfriend and threw her bra on the table of her former supervisors in an "in-your-face" gesture. By March, she was pregnant again, this

time by Dr. Gerstler. Not surprisingly, Dr. Vas' children also showed signs of disturbance: by the time of Ernie's trial, Alex, who had always been somewhat aggressive, had attacked schoolmates with pencils, killed his dog by breaking its neck, attempted to smother his sister, and accused Dr. Vas' father of sexual abuse. All of this information was excluded at trial despite the fact that Dr. Vas, Dr. Vas' father and possibly Alex – not Ernie – were with Isis when the bruises and marks appeared on her body and forehead.

The investigation also ignored all evidence of Ernie's innocence. The sexual assault examination kit results were negative, with no sperm or semen and no pubic hairs. Ernie's clothing, including his underwear, was also negative for sperm or any other bodily fluids. The DNA on his underwear showed skin cells and very light DNA from the child, consistent with routine childcare. A police search of the house found no blood, pornography or signs of abuse -- just a tidy house with diapers neatly bagged in the trash. The psychosocial evidence was equally favorable. The CPS reports confirm that the Lopez children had age-appropriate behavior and were closely bonded to both parents; Ernie passed his court-ordered psychological examination with flying colors; and the Family Support Services counselor who supervised Ernie's visits with his children gave glowing reports of his parenting skills and interactions with his children. Indeed, in 2 ½ years of close scrutiny, Ernie's only observed "abnormality" was his naïve belief that innocent people were not convicted. CPS similarly could not fault DeAnn's parenting practices, with her only "flaws" being her belief that Ernie had not raped and murdered Isis and her failure to report Dr. Vas' poor parenting practices to CPS.[1]

For 2½ years, the evidence of Ernie's innocence and Dr. Vas' failure to provide adequate care for her children mounted, yet the State's "blind focus" on Ernie continued. This is

[1] Had DeAnn done so, however, it is not clear what action CPS would have taken since, when Dr. Shelton later reported Dr. Vas' threats to kill herself and the children, CPS told him that it was *his* responsibility to ensure the children's safety. Aff. of Dr. Douglas Shelton, Ex. 20 at ¶ 26; Ex. 77 (CPS Log) at 3.

particularly disturbing since, by the time Ernie was arrested, the District Attorney knew that the nurses at Northwest Texas Hospital had previously misdiagnosed sexual abuse and that trauma to the posterior fourchette is a nonspecific finding that may be caused by many medical conditions, particularly in children. Indeed, the District Attorney knew that in the *Wilson* and *Ramos* cases (discussed below), the SANE nurses at Northwest Texas Hospital, supervised by the E.R. doctors, had confused the symptoms of E. coli with anal assault (*Wilson*) and the treatment of an ordinary childhood rash with vaginal assault (*Ramos*).

C. Ineffective Assistance of Counsel.

As discussed in the legal section, Ernie received ineffective assistance of counsel. Under the standards set forth by the Texas Court of Criminal Appeals in *Ex parte Briggs,* a case involving a child death, the defense attorney has the duty to obtain the medical records, acquaint himself with the medical issues, and retain medical experts. *Ex parte Briggs,* 187 S.W.2d 458 (Tex. Crim. App. 2005). In this case, defense counsel did none of these things. Defense counsel's failure to obtain the medical records and an independent review of those records is inexplicable since, two years before trial, Dr. Lloyd White provided a preliminary review in which he made clear that there was no medical basis for the sexual assault nurse examiner's "timing" of the genital bleeding. Dr. White also made clear that given Isis' symptoms and the mysterious injuries around her head, neck and arms, as well as the number of people who had contact with her in the days before her death, it was categorically impossible to determine exactly who inflicted any of her injuries or when those injuries were inflicted. Instead of retaining Dr. White or obtaining Isis' medical records for further review, defense counsel went to trial without the records, an expert or even a theory. This was inexcusable since Ernie's parents – who are not well-off – paid Ernie's defense counsel $7,000 for experts, including a

medicolegal review by Dr. White (estimated cost: $3,000), of which Ernie's attorneys spent only $600 (for Dr. White's preliminary review). Other deficiencies in the defense, including an almost total failure to prepare for trial or conduct an adequate voir dire of the jury, are set forth in the legal section.

In this petition, we review the facts, medical issues and law in detail, with citations to the record, affidavits, medical literature and applicable case law.

IV. FACTS

The conviction in this case was based on inadequate and misleading factual and medical information. The affidavits and exhibits attached to this petition present facts that were not presented at trial and which have very different implications. All of the information in this petition is substantiated by affidavits and other reliable sources, including CPS and Court records.

A. Isis' Medical and Social History.

1. Age 1-3 Months (April-August 2003).

a. Family Background. Isis was the third child (fourth known pregnancy) of an unmarried mother, Veronica Vas, a medical doctor. Vas/Shelton Parenting Evaluation, Ex. 72 at 1-2 (Kleinpeter report). When Dr. Vas came to Amarillo in the summer of 1996 to begin a residency in obstetrics and gynecology, she was pregnant by Dr. Steve Gerstler, a Michigan resident. *Id.* After a miscarriage, she began a relationship with Dr. Douglas Shelton, who had been her ob/gyn. Dr. Vas and Dr. Shelton did not marry but had two children, Alex (age 3 at the time of Isis' death) and Emily (age 2). *Id.*

A few months after Emily was born, Dr. Vas left Dr. Shelton and began an affair with Dr. Bobby Miller, a married, alcoholic pediatric resident. *Id.* at 3; Pediatric Records, Ex. 57 at 3

(biological father alcoholic and married); Aff. of Lorrie Word, Ex. 22 at ¶¶ 43-44. Within months, Dr. Vas again became pregnant. However, unlike Drs. Gerstler and Shelton, Dr. Miller was reportedly "furious" when Veronica became pregnant and refused to accept responsibility for the child. DeAnn Lopez Grand Jury Testimony ("GJ"), Ex. 71 at 54-55. Dr. Vas' early attempt to abort the child was unsuccessful, and she continued to smoke and drink hard liquor during the pregnancy, sometimes indicating that she believed that Dr. Miller would leave his wife for her. Aff. of DeAnn Lopez, Ex. 29 at ¶ 34; Word Aff., Ex. 22 at ¶¶ 5-6; Aff. of Brandi Roberts, Ex. 25 at ¶ 16; Aff. of Ashley Looney, Ex. 26 at ¶¶ 7-8.

Dr. Vas gave birth to Isis on April 26, 2000, three weeks before her due date. Pediatric Records, Ex. 57 at 1-2. The birth records are not available, but the available information suggests that the pregnancy was induced and that Dr. Vas was suffering from a significant infection at the time of the birth. *Id.* at 2; Word Aff., Ex. 22 at ¶ 7. The following summer, we understand that Dr. Vas had at least one additional pregnancy (father unknown). *See* Aff. of Dr. Moss Hampton, Ex. 23 at ¶ 3. She also continued her affair with Dr. Miller, requiring that her nanny, Lorrie Word, "hide" Isis or take her out when Dr. Miller visited, since Dr. Miller didn't wish to see Isis or play a role in her life. *See* Word Aff., Ex. 22 at ¶ 44. Dr. Vas also continued her affair with Dr. Gerstler on a periodic basis. GJ, Ex. 71 at 32-33; Word Aff., Ex. 22 at ¶ 13.

b. Deterioration in Dr. Vas' Judgment. After leaving Dr. Shelton, Dr. Vas' judgment and behavior deteriorated. These changes were known to the staff at Northwest Texas Hospital. Dena Ammons, Dr. Vas' nurse, described Dr. Vas' on-the-job behavior as follows:

> After working with her for several years, I notice[d] a behavior change during her pregnancy with Isis. Veronica told me she loved being pregnant and would not tell me who Isis' father was. Veronica would come to the clinic and her appearance would be in disarray. We, the Texas Tech Resident[s] and I, talked about her changes and Veronica's sexual advances toward male residents.

> . . . when she was on call, she was hard to be found, so the other residen[ts] just did without her assistance. Many of the other residen[ts] didn't want to work with her. They felt she was a liability and that she was not reliable.
>
> Veronica would make comments, that when she got off work she was going to go home and get drunk. I talked to Veronica about her drinking and Veronica said she was an obstetrician and a little drinking was not going to hurt the baby. It got to the point that the other doctors didn't want anything to do with her. She was ostracized from the other residen[ts]. . .
>
> The few times I saw Veronica's children they were not clean and they appeared to live in a disabled world. . . I knew the kids were always with someone else . . .
>
> I believe that the stress and natural changes that go through a woman while pregnant, the custody battle, the stress during the residency and the pending return to military service contributed to Veronica's inability to cope with daily challenges and I believe that Veronica became mentally incapacitated.

Aff. of Dena Ammons, Ex. 21.

Dr. Moss Hampton, the Vice Regional Chair of the Department of Obstetrics and Gynecology when Dr. Vas did her residency, was also aware of some of these problems. In his affidavit, Dr. Hampton states:

> During her residency, Dr. Vas had a reputation for promiscuity. She was pregnant by a boyfriend when she came to Amarillo, and there were rumors that she may have slept with a resident during her initial interview. It was common knowledge that after miscarrying the baby, she began an affair with Dr. Douglas Shelton, her ob/gyn, and had two children by him. After that, Dr. Vas had an affair with a married resident, Dr. Bobby Miller, and had a child by him. Following the birth of that child, I believe that she had an ectopic pregnancy. All this occurred during her residency.
>
> During her residency, there were many rumors about Dr. Vas' behavior and personal life. In addition to rumors about her sex life, I heard rumors that her house was very dirty, that her children had been seen eating off the floor, and that she hired patients to baby sit her children.
>
> . . . This behavior, however, did not appear to interfere with her patient care in the clinics or at the hospital. Since Dr. Vas came to work on time, did as she was asked on the job, and was good with patients, I tried to be nonjudgmental about her personal life.

> Some "on-the-job" incidents nonetheless struck me as inappropriate. For example, I saw a note that Dr. Vas had sent to a lower-level resident suggesting that they have sex in the call room. I recognized Dr. Vas' handwriting on the note. It was my understanding that the resident turned her down. I did not raise this issue with Dr. Vas since she was about to finish the residency program and I believed she would pass the note off as a joke.
>
> Dr. Vas' personal appearance was occasionally unprofessional. For example, when she was breastfeeding, she would have areas of leaked breast milk on her shirt in the labor and delivery areas. Other residents and nurses would say things like, "Veronica, go and change" or "take a shower."

Hampton Aff., Ex. 23 at ¶¶ 3-7 (Dr. Hampton is the current Chair of the Department of Obstetrics and Gynecology, Texas Tech University Health Sciences Center in Odessa Texas); *see also* Campos Reports, Ex. 65 at 11-12.

Outside the hospital setting, Dr. Vas' professional judgment also appears to have deteriorated during this period. In the spring of 1999, for example, Dr. Vas called Dr. Shelton from the home of Illa Belle Smith, the children's nanny, saying "Belle can't talk." Shelton Aff., Ex. 20, ¶ 6. Dr. Shelton asked if Dr. Vas wanted him to come over, which she did. When he arrived, the children were running around the house, Dr. Vas was watching television, and Mrs. Smith, a 60 year old black woman, was slumped over in a chair, leaning to the left, with her jaw slack. Dr. Vas again said that she didn't know what was wrong with Mrs. Smith. Since it was obvious that Mrs. Smith had suffered a stroke, Dr. Shelton told Dr. Vas to call 911 while he attended to Mrs. Smith. Since Dr. Vas had been the Chief Resident in charge of the Emergency Room at Texas Tech Hospital for several rotations, her inability to diagnose a simple stroke caused Dr. Shelton considerable concern for his children's well-being. *Id.* Due to such concerns, Dr. Shelton eventually sought custody of the two older children.

c. Kleinpeter Parenting Evaluation. A parenting evaluation by Priscilla Kleinpeter, M.A, L.M.F.T., describes Dr. Vas' pregnancies and relationships. Kleinpeter Report, Ex. 72 at

2-3. Ms. Kleinpeter noted that Dr. Vas suffered severe postpartum depression after her first child's birth and was continuing to take Paxil and see a psychiatrist. *Id.* Ms. Kleinpeter described Dr. Vas' house as follows:

> [The home] . . . was extremely cluttered. It was difficult to walk across the floor because of blankets, clothes, and toys. There were dirty pans and dishes in the kitchen and old, cooked meat, which apparently was prepared for their dog. The children share a room and their bunk beds were haphazardly placed in the room and much of the wall was marked with crayons. The home appeared extraordinarily disorganized.

Id. at 5. Psychological tests administered by Ms. Kleinpeter indicated that Dr. Vas:

> . . . is somewhat immature and impulsive, a risk taker who may do things that other[s] do not approve of just for the personal enjoyment of doing so. She is likely to be viewed as rebellious. She tends to be generally oriented toward pleasure seeking and self-gratification. She may occasionally show bad judgment and tends to be somewhat self-centered, pleasure oriented, narcissistic, and manipulative. . .
>
> Individuals with this profile pattern tend to be rather likeable and personable and may make a good first impression. Her tendency to take personal risks and to act out at times may make it somewhat difficult for her to maintain close relationships . . .

Id. at 4-5 (psychological treatment for this personality type may not be successful due to tendency to blame others for her problems). Based on Dr. Vas' need for psychiatric care, poor judgment, the relative stability of daycare arrangements, and the physical features of the homes, Ms. Kleinpeter recommended that the children's primary residency be transferred to Dr. Shelton. *Id.* at 13-14.

d. Daycare: Lorrie Word. Lorrie Word, Dr. Vas' 19 year old nanny, looked after the Vas children from September 1999 to July 2000. In her affidavit, Ms. Word describes Dr. Vas' home life and failure to look after her children. Ms. Word notes that Dr. Vas' house was generally in much worse shape than Ms. Kleinpeter described:

> Veronica knew ahead of time that [Ms. Kleinpeter] was coming to the house, so she cleaned the house and had me help her. Generally, the house was filthy, with spiders and insects. After the clean-up, it was the cleanest and neatest it had been in the time I knew Veronica, though it still wasn't very clean by most people's standards. Later, Veronica received a report in which the woman described the house as really messy. Veronica was furious. . . I thought the woman's description of the house was right and that it was lucky the woman hadn't seen it before the cleanup.

Word Aff., Ex. 22 at ¶ 26.[2] Insects were a particular problem:

> Veronica's house was always messy and dirty, with spiders, roaches and other insects. Veronica wouldn't let me kill flies in the house. She believed that they might be reincarnations of her mother since she said that a fly had buzzed around during her mother's funeral. Since we couldn't kill them, there were a lot of flies in the house. I killed the spiders and roaches as best I could.

Id. at ¶ 12.

Ms. Word describes Dr. Vas' lack of concern for Isis' well-being, starting before birth and continuing through the period that Ms. Word cared for the baby. For example:

> When Veronica was pregnant with Isis, she smoked heavily (often 2-3 packs a day). She also drank heavily and took mood elevators. Sometimes she went in the garage and smoked and drank for hours. Another time, she sat at the kitchen table with a friend and drank Jose Cuevo tequila straight from the bottle . . .
>
> It bothered me when Veronica drank when she was pregnant because I knew that you aren't supposed to drink when pregnant. When I said something to Veronica about her drinking, she just rolled her eyes. Since she was an ob/gyn, it wasn't possible to argue with her. Veronica also told me that when she first found out she was pregnant with Isis, she took birth control pills to try to abort her, but it didn't work.
>
> When Isis was born, I went with Veronica to the hospital. We went to Baptist St. Anthony's because Veronica didn't want to deliver at Northwest Texas Hospital, where she worked. She said that she didn't want the doctors there to know she was giving birth. At the hospital, they gave Veronica an I.V., and we left the hospital with her friend, Mary Ann Franken, who is also an ob/gyn. We went to the house where we drank a bottle or two of wine, and then went to Victoria's Secret before going back to the hospital. I was with Veronica during the birth. After Isis was born, [Isis] didn't cry for a long time, and I always thought she was drunk.

[2] Ms. Word was not responsible for housekeeping unless specifically asked and separately paid.

> When Isis was born, she was very small, and she and Veronica stayed in the hospital for a couple days. When they were released, Veronica and I brought Isis home. Veronica immediately left the house without telling me where she was going. I was scared because I didn't know how to look after a newborn, and I called my mother for advice. Veronica didn't come back for about five hours.

Id. at ¶¶ 5-8.

After Isis' birth, Dr. Vas' behavior became more erratic, and she paid even less attention to her children:

> Shortly after Isis was born, I moved into Veronica's house, and I worked virtually all the time. Veronica was finishing her residency and worked more or less regular hours. When she finished work, she would come home for an hour or so and then go out again. She spent very little time with the children. I worked both during the week and on the weekends. I generally gave the children all three meals, as well as their baths, and put them to bed.
>
> At first, Veronica usually makes a great first impression on people. However, many of her behaviors are strange. At first, I thought it was because she was a doctor and therefore behaved differently. Later, I became concerned for the children's well-being.
>
> From the beginning, I noticed that Veronica did not buy the children clothes, so I bought them clothes out of my own money. Veronica also often became angry or upset. If she was angry, she either wouldn't speak to me or would slam cupboard doors or slam thing on counters. I called these meltdowns. They were almost like tantrums. Other times she locked herself in the garage, smoked cigarettes, and drank. . . .
>
> She was also unreliable about telling me where she was. I tried not to call her very often when she was at work. However, sometimes I needed to reach her at work if, for example, one of the children was sick. When I would call her work, they would sometimes tell me that she wasn't on duty that day. Over time, I learned not to rely on her. I was told by Veronica not to call Doug Shelton for anything even if I could not get in touch with her.
>
> When she was home, Veronica did not help with the childcare or discipline the children, even if I was supposed to be off duty. Even though all three children were in diapers, I do not recall Veronica ever changing a diaper. Apart from breastfeeding Isis, she did not feed the children when I was at the house, which was almost all the time.

> [I]f Veronica was home, [the children] would take food out of the refrigerator, and smear ketchup, meat and other food all over the house. Once, when Alex had a dirty diaper, he smeared the feces on the wall. Veronica did not see anything wrong with any of this . . . If I didn't clean up, she would leave the food and feces on the furniture and walls. . .
>
> Veronica also slept a lot. When she slept, she left the children unsupervised, and they would run wild. As a result, I didn't feel that I could leave them with her for very long . . . After Isis was born and I moved in with Veronica, I did virtually all of the childcare for all three children. If I needed a weekend off, Veronica would find other babysitters.

Word Aff., Ex. 22 at ¶¶ 9-11, 19-21, 24; *see also* Roberts Aff., Ex. 25 at ¶¶ 6-11 (Vas left Isis unattended outside on blanket for hours in heat; older children's diapers often filled with stool or hanging to knees); Looney Aff., Ex. 26 at ¶¶ 9-10 (describing Dr. Vas' neglect and resentment of the children, particularly Isis); Pediatric Records, Ex. 57 at 3-4 (safety concerns), 7 (left for Las Vegas while breastfeeding) and 17 (weight and nutritional concerns).

Ms. Word was particularly upset when Dr. Vas left Isis unattended in July 2000, when Isis was about 2 ½ months old. Word. Aff., Ex. 22 at ¶¶ 31-35. Ms. Word had taken an evening off, the two older children were going to Dr. Shelton's, and Ms. Word understood that Dr. Vas would be looking after Isis. However, when she was about to leave, Dr. Vas said that she had to go into work. When Ms. Word asked who was going to look after Isis, Dr. Vas said she was taking Isis with her and that the nurses at the hospital had agreed to look after her when Dr. Vas was doing blood draws. *Id.* at ¶ 31.

When Ms. Word came back to the Vas home at around 2 a.m., Dr. Vas' van was gone but Isis' diaper bag and car seat were still in the house. She thought this was odd but believed she was alone in the house until she saw a wad of blankets move on the daybed in the living room. *Id. at* ¶¶ 32-33. Although initially frightened, she decided her cat must be tangled in the blankets, so she went to free the cat. *Id.* at ¶ 33. When she started to untangle the blankets, she

saw Isis in the wad of blankets. Isis and the bedding were soaked in urine, Isis had coughed up her bottle, and there were several bottles scattered around the bed. *Id.* at ¶ 34. Ms. Word was panic-stricken when she saw Isis in this condition. Ms. Word states that "[f]rom the condition of Isis and the bed, as well as the diaper bag, it seemed obvious that Isis had been left alone for many hours and possibly for Veronica's entire shift." *Id.* Dr. Vas did not return until 3 a.m. *Id.* at ¶¶ 35, 50; *see also* Roberts Aff., Ex. 25 at ¶ 13; Looney Aff., Ex. 26 at ¶ 15 (frantic phone calls from Word when she found Isis left alone).

Other incidents also caused Ms. Word concern. For example, Dr. Vas allowed Alex (nearly 3) and Emily (about 18 months) to drink alcoholic daiquiris at a shower held at Dr. Vas' house, with many Northwest Texas Hospital doctors or their wives in attendance. Word Aff., Ex. 22 at ¶ 30. When Ms. Word removed the daiquiris, Dr. Vas gave them back, thinking that it was funny to see the children drink. Ms. Word felt that some of the doctors at the party were uncomfortable with having the children drink, but they didn't say anything. Ms. Word was angry and took pictures, but Dr. Vas later tore up the pictures. *Id.*; *see also* Campos Reports, Ex. 65 at 12 (Dr. Hensley's wife in tears after attending a baby shower at Dr. Vas' home due to the condition of Dr. Vas' children; Isis wore only a diaper and other Vas children were eating off the floor).

By the end of July, Ms. Word had given notice but was very concerned for the children. She therefore told Dr. Shelton that Dr. Vas had left Isis unattended in July and that she understood all three children had been left alone on a hot day in the van, on a busy street, without adult supervision, while Dr. Vas stayed in the house. At that time, Alex was 3, Emily not yet 2, and Isis approximately three months old. Word Aff., Ex. 22 at ¶ 38; Roberts Aff., Ex. 25 at ¶ 17; Looney Aff., Ex. 26 at ¶ 16. Dr. Shelton notified his attorney, who deposed Ms. Word. In the

deposition, Ms. Word confirmed that she had found Isis unattended in July. Shelton/Vas Custody Proceeding, Ex. 74(b) (deposition excerpt). After the deposition, Dr. Vas and her attorney backed Ms. Word into a supply room until she was up against a wall and tried to get her to change her deposition testimony. Ms. Word was scared and crying, but refused to change her testimony because it was truthful. Word Aff., Ex. 22 at ¶ 49.

2. Lopez Daycare Arrangements, August-October 2000. When Ms. Word left her position, Dr. Vas asked one of her patients, DeAnn Lopez, to look after her children one weekend a month and every Monday. DeAnn described her relationship with Dr. Vas in her grand jury testimony.[3] D. Lopez GJ Testimony, Ex. 71.

a. Relationship Between Dr. Vas and DeAnn Lopez. Dr. Vas was DeAnn's ob/gyn, and she delivered the two Lopez children, Cody and Sienna, who were approximately the same age as Alex and Isis Vas. During DeAnn's second pregnancy, Dr. Vas was pregnant with Isis, and she would complain to DeAnn at her office visits:

> . . . And then, I would go in to see her and she would just start talking to me about personal life . . . how all the Dr.'s up there don't like her . . . she had me feeling sorry for, I mean my heart went out to her. . . and I thought she doesn't have any friends . . .
> . . .
> And she would tell me how, she's not gonna deliver . . . her baby in a hospital because she can't go to North West Texas Hospital because that's where her colleagues are and they always talk about her there, and she didn't want to go to . . . Baptist St. Anthony's cuz that's where Dr. Shelton delivers babies. And she didn't want to go there because of him.
>
> So she was gonna fly in her . . . her friend Mary Ann and have her deliver her baby in her living room. And, she was telling me that her gynecologist, Dr. David, was trying to talk her into having the baby at the hospital. I mean she was telling me all of this when I would go visit her. . . and I would go home and I would tell Ernie, you know, my heart goes out to her.

[3] Since this is sworn testimony by the State's lead witness, produced in response to the State's questions, its reliability is undisputed.

GJ at 14-15. Dr. Vas delivered Isis at Baptist St. Anthony's several weeks before her due date, accompanied by Mary Ann Franken, also an ob/gyn, and Ms. Word. Two and a half weeks later, Dr. Vas delivered Sienna, the youngest Lopez child. GJ at 15.

b. Childcare Arrangements with DeAnn Lopez. In early August, Dr. Vas called DeAnn and suggested that they take their children to the water park. Since DeAnn thought the children were too young, Dr. Vas suggested that DeAnn bring her children to Dr. Vas' house. DeAnn described the condition of the house and children as follows:

> . . . I don't know how to even begin. . . there was stuff all over the floor, clothes, shoes, toys . . . blankets. . . food . . . nothing was put up in a spot I mean I don't think there was any sort of . . . designated place for things . . . Isis was in her swing. The kids were out in the back yard . . . playing and they didn't even have clothes on . . . there was toys scattered all over the back yard. There was food out on the counter in the kitchen.
>
> Paper scattered everywhere. Papers, magazines, and books all stacked up like pretty high in the corner . . . there was spider webs in every single corner . . . just stuff everywhere . . . I really thought that was strange that [the] kids weren't dressed but I . . . didn't say anything again cuz . . . it's not my place . . .

GJ at 18. During that visit, Veronica "pour[ed] her heart out" to DeAnn, telling her that she was paying Ms. Word $300 a week to take care of her children, that Ms. Word didn't clean the house, that Dr. Vas wasn't even sure she was looking after her children, and that Dr. Vas was planning to fire Ms. Word. *Id.* Two days later, Dr. Vas asked DeAnn if she would watch her children if she fired Ms. Word. GJ at 20. DeAnn was initially reluctant but agreed since it was only one day a week (Mondays) and one weekend a month and would generally be just Isis since the two older children would be with their father, Dr. Shelton. *Id.*

Since Dr. Vas complained about the condition of her house, DeAnn offered to clean it when Dr. Vas was at work. The following Saturday, DeAnn cleaned from noon to 6 p.m., when she "gave up and went home." She couldn't get the house clean, but she at least "had it where

you could walk." GJ at 21. While DeAnn was cleaning, Gail Turner and her mother came over to look for bottles or nipples since they were babysitting Isis and Dr. Vas hadn't left feeding supplies. GJ at 21.

DeAnn was not willing to babysit at Dr. Vas' house because of the condition of the house and suggested that Dr. Vas bring the children the night before a work day rather than waking them early. GJ at 23. That night, Dr. Vas began sleeping on the Lopez living room floor, with Isis on the couch and the other children on pallets:

MB: Now do you know if the reason was so she didn't have to get up so early, or do you just know she spent the night?

DeAnn: Well, she spent the night an awful lot, I wouldn't guess that would be the reason (laugh).

MB: What do you think the reason was?

DeAnn: 'Cause she didn't want to go home to her house 'cause it was so, you know . . .

MB: Are you saying her house was just filthy is that what you're talking . . .?

DeAnn: I am talking beyond filthy.

MB: Was, was there cockroaches crawling everywhere?

DeAnn: There was spiders everywhere, spiders.

MB: You said, you talked about uh, animal feces, rats.

DeAnn: Rat droppings.

MB: I mean did you ever see a rat or a mouse?

DeAnn: I never seen 'em, but they were all over the place. Well mouse, it could be mouse, I don't know the difference, but there was droppings all over the counters, and the corners.

MB: When you say counters, are you talking about where the food was at?

DeAnn: Um-hmmm, in the kitchen.

GJ at 215.

DeAnn looked after Isis and sometimes the other Vas children from August through October. However, she did not see the children for several weeks during this period since Dr. Vas' father, Charles Vas, looked after them when he was visiting from Indiana. GJ at 29-30. Mr. Vas was in town for a week in late August/early September and again for at least two weeks in October. *Id.*; *see* B. Shelton Aff., Ex. 24 (calendar attached) (Mr. Vas in town week of August 23).

As the weeks progressed, Dr. Vas and her children stayed at the Lopezes for longer and longer periods, with Dr. Vas continuing to sleep on the living room floor:

MB: . . . so she begins to . . . spend the night some at your house?

DeAnn: Yes.

MB: How often did that occur?

DeAnn: A lot. I don't know how often, I mean I can't count. But she would do it a lot.

. . . And that one weekend a month turned into all the time. . .

MB: And during some of this time whenever you're saying that you kept . . . Alex and Emily but you [were] the primary caretaker of at this time I assume of Isis then?

DeAnn: Yes.

GJ at 24-26 (Vas basically tried to move in); GJ at 39 (didn't have kids so much in August but progressed until she had them almost all the time); GJ at 129 (by end, Vas rarely had the children).

When DeAnn looked after Isis and the older Vas children, Dr. Vas did not supply appropriate formula or clothing:

> She would bring . . . Isis over and she wouldn't even bring him-her any food. She wouldn't bring formula, she would bring me in this little uhm it was 16 oz little jug . . . just the whole 16 ounces you know and babies eat a lot (giggling) and so I would use my food . . . on Isis and she wouldn't bring her clothes but since my baby was the same age . . . I'd dress her in Sienna' clothes. She would bring Alex and Emily . . . clothes sometimes. But a lot of the times I would have to put on Alex, Cody's clothes and I had clothes that were Nikki's . . . that she had out-grown and I saved that I would put on Emily, or I would just wash their clothes that they had.

GJ at 23; *see also* GJ at 41 (Dr. Vas didn't bring formula or repay DeAnn for providing it); Aff. of Chrystal Lopez, Ex. 34 at ¶ 4 (DeAnn would have to borrow formula for Isis).

c. Isis' Health. During the time that DeAnn looked after Isis, Isis' health deteriorated. In August, when DeAnn first began looking after Isis, Isis was small but happy. However, by September, when she returned from Dr. Vas', Isis never seemed to feel well, and DeAnn and her sister Mary often talked about what might be wrong with her. *See, e.g.,* Aff. of Mary Guerrero, Ex. 30 at ¶ 4; *see also* CPS Reports, Ex. 67 at 3 (DeAnn reported Isis sick and feverish for a long time; Dr. Vas thought possibly pneumonia but did not take to doctor); Aff. of Shannon Lopez, Ex. 33 at ¶ 7 (DeAnn worried that Isis was getting sick over and over in September; DeAnn asked whether she should take Isis to a doctor; seemed uneasy with Isis' health but was obviously relying heavily on Dr. Vas' judgment); Pediatric Records, Ex. 57 (no appointments between June 30 and October 12). On October 5, the last evening that the Lopezes saw Isis for nearly three weeks, Isis was still unwell. *See, e.g.*, Shannon Lopez Aff., Ex. 33 at ¶ 10 (Isis seemed sick, thin and possibly developmentally delayed); C. Lopez Aff, Ex. 34 at ¶ 8 (Isis very small; didn't look healthy, listless and cranky). Pat Turner, the babysitter who cared for Isis from October 6-9, similarly described Isis as unwell, lethargic and initially unable to

move her right arm on October 6. CPS Lopez Investigation, Ex. 67(c) at 7. Dr. Vas told Ms. Turner that she would address this issue, but did not do so. *Id.; see also* Pediatric Records, Ex. 57 (Vas does not report illness or problem with arm). This was unfortunate since an inability to move one side of the body is a sign of sinus venous thrombosis, or childhood stroke. *See, e.g.,* Ex**.** 156 at 51. The pediatrician did, however, raise concerns with Isis' failure to gain weight. Pediatric Records, Ex. 57 at 17-18; *see also* Word Aff., Ex. 22 at ¶ 51 (Isis had lost weight at mid-October visit).

d. Vas' Personal Relationships. During this period, Dr. Vas talked to DeAnn about her personal life and relationships:

> MB: . . . go ahead and tell us. . . [the] general nature of those conversations.
>
> DeAnn: Well she would talk to me about [Dr. Miller, Isis' father] because they would get together every week together at her house and drink a bottle of wine and have sex is what she would tell me . .
> . . .
> she would say it so casually . . and we drink a bottle of wine and have lots of sex that's how she said it . . .
>
> MB: This, this is after the birth of Isis?
>
> DeAnn: Yeah . . . she started telling me about the casual sex meeting at her house every week. And . . . she would always tell me how . . he wanted nothing to do with Isis, that he was furious when . . he found out that she was pregnant with Isis and. . . I mean she would just tell me things like that, and then she went, one time, went into detail about you know what they did and I mean it freaked me out and I couldn't believe that she even told me.

GJ at 28-29 (describing sexual acts at prosecutor's request). Dr. Vas also displayed sexualized behavior to the residents at Northwest Texas Hospital as well as to Sabian Lopez, Ernie's brother. Hampton Aff., Ex. 23 at ¶ 6 (Vas note to lower-level resident suggesting sex in the call

room); Ammons Aff., Ex. 21 (sexual advances towards male residents); Aff. of Sabian Lopez, Ex. 35 at ¶ 3.

At the same time, Dr. Vas was continuing her affair with Dr. Gerstler. GJ at 32 (Vas told DeAnn that she and Gerstler would get together every 15 months and that she continued to see Gerstler while living with Dr. Shelton). This is consistent with notes from the files of David Isern, Ernie's attorney, who received an anonymous phone call purportedly from Dr. Gerstler's former girlfriend. Excerpt from Isern file, Ex**.** 82 (indicating that Dr. Vas and Dr. Gerstler were continuing to see each other and had left drug paraphernalia at the house). By September 2000, Dr. Gerstler had broken up with his girlfriend, and Dr. Vas made an effort to re-establish the relationship. GJ at 34 (Vas wanted to be in Michigan weekend after breakup so she could "get right in"); GJ at 247-248 (Vas went to Michigan three or four times in this period). After these visits, Dr. Vas told DeAnn:

> . . . she told me that Steve would always cry when, you know, when they would talk about the baby that they lost, and I just, I-I got the impression from Veronica about Steve probably not wanting to raise her children because every time she would go to Michigan and through these months she went three or four times, not just this two weekends [in October], you know, she had gone before, *and she would come back and she would tell me, you know, 'cause she loved him and she wanted to be with him in Michigan. And she would always tell me that he would say no wife of mine's gonna live in Texas while I live in Michigan, you know . . . and she . . . would say, but what man would want me with all this baggage . . .*

GJ at 247-248 (emphasis added); Word Aff., Ex. 22 at ¶ 13 (Veronica obsessed with former boyfriend, Steve; said he was her "true love" and she would do anything to be with him).

e. Efforts to Avoid Navy Commitment. Since the Navy had paid for Dr. Vas' education, Dr. Vas was supposed to move to San Antonio to fulfill her Navy commitment after completing her residency. GJ at 127. However, she had already postponed this move and was trying to get out of this commitment:

> They postponed [reporting to the Navy] because of the custody battle. And she had been [trying] to get out of the Navy – she'd always tell me I'm going to write 'em letters so I can get out of it. And I'm not going to go. And I'm going to tell them in the letters that I'm not going to be a very good . . . officer . . . if they make me go . . . they got her letter and she even called them and talked to them, and they're going to make her go anyway.

GJ at 128; see also Word Aff., Ex. 22 at ¶ 14 (Vas trying to get out of Navy commitment when Word left in July); Shelton Aff., Ex. 20 at ¶ 16 (Vas trying to figure out ways to avoid her Navy commitment throughout their relationship); Campos Report, Ex. 65 at 6 (Vas asked neighbor, a member of the Navy reserve, about ways to be discharged from Navy).

f. October 5 Lopez Family Party. On October 5, the Lopez family celebrated Ernie's father's birthday. Ernie and DeAnn brought the Vas children with them, and Dr. Vas came over for a short period. As discussed above, at the party Isis seemed ill, and struck at least one family member as possibly developmentally delayed. Shannon Lopez Aff., Ex. 33 at ¶ 10. When Dr. Vas came over, she held Isis with the baby's back to her chest, facing out, and attempted to feed her mashed potatoes and gravy from a fast food restaurant from that position. Isis couldn't swallow the food – which was inappropriate for a sick baby – and spit it up. *See* C. Lopez Aff., Ex. 34 at ¶ 7; Aff. of Rosa Lopez, Ex. 32 at ¶ 8. When Isis continued to be irritable, Ernie and his sister-in-law took Isis and his sister-in-law's baby to a bedroom to calm them down. C. Lopez Aff., Ex. 34 at ¶ 8. Dr. Vas soon left for a high school football game, leaving her children with Ernie and DeAnn. *Id.* at ¶ 7.

3. October 6-25: Childcare and Pediatrician Appointment. DeAnn did not see the Vas children from approximately October 6 to 25. Since Isis was sick and covered with bruises when she returned to the Lopezes on October 25, this time period is important.

a. October 6-9. On October 6, Dr. Vas arranged for Pat Turner, a former neighbor, to babysit Isis from October 6-9 since Ernie and DeAnn were going to Dallas for the weekend.

As indicated, Ms. Turner reported that Isis did not seem well and wasn't moving her right arm, but seemed better by the end of the weekend. Ms. Turner asked to take Isis to a doctor, but Dr. Vas said she would handle the arm and medication issue later. CPS Lopez Investigation, Ex. 67(c) at 7.

b. October 10-25. Charles Vas, Dr. Vas' father, provided daycare for Dr. Vas' children for most of October. Although it is unclear who looked after Isis on October 9 and 10, by October 11 Dr. Vas had rented a motel room in Dumas, presumably for her father and the children. Campos Report, Ex. 65 at 6. Mr. Vas looked after the children from October 12 to 25, when he returned to Indiana. GJ at 30-31.

c. October 12 Pediatric Appointment. On October 12, Dr. Vas took Alex and Isis to the pediatrician, where Isis received her four-month vaccinations, which were overdue. *See* Pediatric Records, Ex. 57 at 17. Dr. Werner, the pediatrician, did not note bruises or physical problems other than a *candida* diaper rash. *Id.* at 17-19; *see also id.* at 12 and 15-16 (*candida* diaper rash also present on last two pediatrician visits). Since Isis had dropped from above the 10^{th} percentile to below the 5^{th} percentile in weight and did not appear to have a regular feeding schedule, Dr. Werner urged Dr. Vas to feed Isis on a more regular schedule and to increase her formula from 6 to 8 ounces. *Id.* at 17, 20. This report is consistent with DeAnn and Mary Guerrero's reports that Isis had been unwell throughout September and with Lorrie Word's observation that Isis had lost weight by October. Word Aff., Ex. 22 at ¶ 51. Dr. Werner later told CPS that she had concerns about Dr. Vas' childcare but did not have enough evidence to report abuse or neglect. CPS Vas Investigation, Ex. 77 at 7 (Log of Contact Narratives) (Werner concerned with missed appointment and failure to gain weight; spoke to Vas multiple times about poor choices and need to take better care of her children).

Dr. Vas told DeAnn that she responded to Dr. Werner's concerns by increasing the concentration rather than the volume of the formula:

> *[Isis] was thin* . . . after Veronica had told me that she fell off her weight chart she told me she started buying the concentrated formula and she would add more formula tha[n] water. She [was] trying to give her I guess the vitamins that are in the formula, that's what she told me she [was] giving her like – cause she's supposed to mix . . . like if you make a 6 ounce bottle you're supposed to make mix 3 ounces of formula to 3 ounces of water. And she said that she would mix like 3 ounces of formula to like an ounce of water to make 4 ounces.

GJ at 67. Increasing the concentration of the formula in this manner was irresponsible since it would contribute to dehydration. *See* Sunderland Aff., Ex.4 at ¶ 8.

d. October 18 Haircut. On October 18, DeAnn cut Dr. Vas' hair, which was so badly matted and tangled that DeAnn could not comb it. Ex. 71, GJ at 31 (Dr. Vas pulled out large wad of her own hair when DeAnn asked her to comb it). Dr. Vas told DeAnn that she was going to Michigan to see Dr. Gertsler on October 20, that the two older children would be with Dr. Shelton, and that her father was keeping Isis. GJ at 33. DeAnn expressed some concern about leaving Isis with her grandfather for an entire weekend:

> . . . I did pop off and I said, "well who's gonna keep the kids?" And she said . . . "Doug [Shelton]'s gonna have the kids and my dad's gonna watch the baby." And I remember saying, uhmmm I don't know exactly how I worded it but it, pretty close [to] this, "Veronica, is he okay with that, he came all the way from Indiana to see you and you're leaving to Michigan and you're leaving him with an infant?"
>
> She says, "oh yea." She goes I'd fly him anywhere he wants to go but he didn't have anywhere to go. And she goes, I would fly her, his girlfriend in but she has to work. And I said, "okay." . . .

GJ at 33-34. Since her father was leaving on October 25, Dr. Vas asked DeAnn to keep her children the following Wednesday while Dr. Vas worked, as well as on the weekend of October 27 so that she could return to Michigan. GJ at 34, 44.[4]

e. Daycare by Charles Vas. Mr. Vas looked after the Vas children from October 12 to 25, and cared for Isis by himself from Friday, October 20th to Monday, October 23rd while Dr. Vas visited Dr. Gertsler in Michigan. Although Isis was bruised and/or bitten by spiders during this period, the record contains no indication of Mr. Vas' explanations for the bruises or bites. Mr. Vas may not, however, have been an appropriate caretaker for a sick baby. Ms. Word describes Mr. Vas' interactions with the children as follows:

> When I was at Veronica's, her father, Charles Vas, came to visit three or four times, for a week or so at a time. . . He was always irritable or angry, and he didn't interact with me or the children. The children didn't like being around him, and he didn't seem to like to be around the children. . .
>
> Mr. Vas didn't have any patience with the children and didn't seem to understand their needs. For example, on one of his visits, I was getting Alex and Emily bathed and ready to go to the Sheltons . . . Because I was hurrying to get Alex and Emily ready, I couldn't look after Isis, who was less than three months old. Mr. Vas didn't help. When I handed Alex and Emily over to the Sheltons on the front porch, I started to go to get Isis, who was crying. By then, she was probably wet and hungry. Mr. Vas put himself between me and Isis and ordered me to leave her alone and let her cry. He wouldn't let me pick her up. . .
>
> Because of the way Mr. Vas treated the children, I tried to take the children out of the house whenever he was visiting Veronica. If he was there when the Sheltons had Alex and Emily and I was supposed to have time off, I took Isis with me. I did not feel comfortable leaving the children, particularly Isis, with him.

Word Aff., Ex. 22 at ¶¶ 27-29.

Barbi Shelton, Dr. Shelton's wife, also felt uncomfortable leaving the children with Mr. Vas:

[4] It is a little unclear whether Dr. Vas asked DeAnn to keep the children for the second weekend on Wednesday, October 18, when she had her hair cut, or on Wednesday, October 25, when she brought the children to DeAnn's. The context suggests, however, that these arrangements were made on the October 18.

> Veronica's father sometimes visited her for a week or more at a time, and I met him once or twice. I remember one occasion particularly clearly. I believe this was in August 2000, when Alex was three and Emily was not yet two. On August 23, Veronica had asked us to keep the kids for a week because her father was in town. At some point, I was supposed to drop the children off with Veronica's father, but he wasn't home when I was supposed to drop them off so I waited until he returned. Usually the children were good about changing custody. However, when I tried to give them to their grandfather, Alex grabbed my legs and dug his fingers into my thigh so hard that it left finger marks on my leg. He had never done anything like that before. Emily was screaming in my arms. When I tried to hand her to her grandfather, Mr. Vas told me, curtly, that she could walk and ordered me to put her on the ground. He then ordered the children to get into the house. After that, I was reluctant to leave the children with him.

Aff. of Barbi Shelton, Ex. 24 at ¶ 8. Dr. Vas nonetheless left Isis alone with her father for the weekend of October 20 so that she could visit her boyfriend.

4. <u>Lopez Home: October 25-28</u>. Since Isis' symptoms in the days before her death are critical to any analysis of her death, we review Isis' symptoms and the events of this period in detail.

a. <u>Wednesday, October 25</u>. Dr. Vas brought Isis and the two older children to DeAnn at about 4:30 p.m. on Wednesday, October 25 after taking her father to the airport. GJ at 34-35. At that time, Isis was covered with bites or sores on her face. *See, e.g.,* Police Reports, Ex. 63 at 14 (Vas admitted "bug bites" present before going to Lopezes).

(i) <u>Marks/bites on head</u>. Dr. Vas told DeAnn about the bites on Isis' head on Wednesday afternoon when DeAnn went to pick up Isis:

> . . . so, I'm struggling with her car seat . . . And Veronica goes, "Oh, she got bit," and I go, "what," you know and so I picked up the baby and I'm holding her and uhm. . . she was asleep and . . . I saw it, that's when I saw it, when she told me I saw it . . . a number of little bumps like from right here to about right here, and about this wide. On, I believe, the . . . left side of her head. Cause when I looked down at her I believe that it was on her left my right but I'm not real sure.
>
> *And . . . she said, "she got bit," and I freaked out, I said, "VERONICA, WHAT BIT HER?" And she said, "I don't know, my dad thinks it's flea bites and I checked the dog and there's no fleas.*

> So I said, "okay," you know and I'm holding her, and she's so sweet, you know and she would look up and she smiled at me and . . I held her. And then right after that [Veronica] left.

GJ at 37 (italics added, capitals in original). DeAnn described the spots as little raised bumps with a red head. They were more uniform than the bites DeAnn had seen on her own children, more side by side than spread out. The skin wasn't broken, and it looked like the blood was at the surface. GJ at 157-159.

When Ernie came home from work and saw Isis, he immediately wanted to know what had happened to her. GJ at 42. DeAnn told him that Dr. Vas said she thought Isis had been bitten by fleas but that the bites looked better than they had on Monday, when they were oozing puss. *Id.* Ernie describes the marks as red and raised, with a black center, slightly pussy on the outside and about the size of BB's. Aff. of Ernie Lopez, Ex. 37 at ¶ 30.

(ii) Black stool. Ernie then helped DeAnn with Isis. When he was changing Isis' diaper, DeAnn and Ernie noticed that her stool changed color:

> And . . . I looked at it and . . . I said that's weird poop, isn't it? And he said, "yeah it is." And it was like black, cause you know it wasn't smashed in the diaper and it was coming out . . . and it was black and green and it was like intertwined. I've never seen it look like that before and he goes, yeah it is, and so he just put her diaper back on her and laid her down. I don't even think he gave her [a] bath, cause she just . . . didn't . . . really respond, she just laid there and . . . anytime anybody would change her diaper she would cry . . . and I'm not just talkin' just a little cry, she'd cry a lot . . .

GJ at 43. Although DeAnn and Ernie did not know this, black stool may be a sign of abdominal injury. *See, e.g.,* Sunderland Aff., Ex. 4 at ¶ 7 (black stool may be result of deranged coagulation but can also be caused by blow to abdomen).

(iii) Redness in eye. On Wednesday evening, Ernie also showed DeAnn that Isis had some redness in her left eye. DeAnn described it as a red line, more towards the top and the side,

since when you looked directly at her, you couldn't see it. GJ at 162-164; *see also* Ernie Lopez Aff., Ex. 37 at ¶ 32.

(iv) Illness, 3 a.m. – 6 a.m. That night, Dr. Vas returned to the Lopezes at about 10 p.m. and went to sleep on the living room floor. GJ at 49. At about 3 a.m., Isis started crying. Ernie, who was the first to get her, tried to give her a bottle, but she wouldn't take it. GJ at 52. Instead, she cried, almost uncontrollably, for about 20 minutes. GJ at 72. DeAnn, Ernie and Dr. Vas stayed up with Isis, discussing her condition, from 3 to 6 a.m. DeAnn didn't know whether this was a new illness or a continuation of the same illness. GJ at 137.

(v) Fever. When Isis got up, she was feverish, and Dr. Vas gave her apple juice with Tylenol. GJ at 137. Since no one took Isis' temperature, DeAnn didn't know whether it was "alarming." GJ at 138.

(vi) Breathing difficulties. Isis was having breathing difficulties, and Dr. Vas told DeAnn, "it's like she's not breathing." GJ at 54. In response to the prosecutor's questions, DeAnn described Isis' breathing as "major congestion," almost like a rattle. GJ at 166-167.

(vii) Dr. Vas' concern with father's care. Dr. Vas also expressed concern with her father's childcare:

> DeAnn: *. . . [S]he goes I leave my kid, my children with somebody and I come home to this and . . . she's looking . . . at everything on her . . . I thought she was referring to the weekend . . .*
>
> . . .
>
> MB: Now, *continue* on what happened after Dr. Vas told you about uh being discouraged about the way the kids were being kept when she left them in someone else's care.
>
> DeAnn: Uhm. Well, she didn't really say anything else about that. . . .
>
> MB: *Did she say whose care the children were left in?*
>
> DeAnn: *I, I took it that she was referring to the weekend.*

MB: *And you understood that to be her father, Charles Vas?*

DeAnn: *Uh hum*.

GJ at 54-55 (emphasis added).

(viii) Call to pediatrician. DeAnn rocked Isis to calm her down while Dr. Vas attempted to call Dr. Werner, Isis' pediatrician:

> . . . and Veronica goes well that's not a hungry cry that's a hurting cry. And uh, so we went into my front room . . . *and* she handed Isis to me and I sat down . . . and I was rocking her. *And she goes I'm going to take her in.* And I said OK. . . . Dr. Carmen Warner – is Isis' doctor – she dialed her number. And so . . . I get her to calm down – she's not crying anymore. And uhm so she calls the doctor and she hangs up the phone and she says, "Oh I got the wrong number. And I said Oh. She goes, do you have a phone book. And I said, yeah, it's in there under the entertainment center. So she goes and she gets my phone book and she opens it up, but she doesn't look for the number.

GJ at 52 (emphasis added). As set forth below, Dr. Vas never did take Isis to a doctor or emergency room, but instead elected to treat her herself.

(ix) Bruises on chest. After DeAnn calmed Isis, Dr. Vas took off Isis' clothes and showed DeAnn and Ernie the bruises on Isis' chest:

> [T]hat's when we saw the bruising on the chest. It was right there . . . there was one on each side right here and then there was one on her back right across, but right there just on one side though. And . . . she's like – but they're fading – they're –they're like yellow, you know, fading like one was almost gone on the front. On the other side was – it was still there but you could tell it was kind of going away because it was yellow – you know like a yellow-green color and uh she's holding Isis and she goes – *she goes I would take her in but this. . . she goes, I would take her in but this, you know, referring to the stuff that's on her.*

GJ at 52-53 (emphasis added); GJ at 178 (Vas didn't want to take Isis in because of bruises); Court of Appeals Opinion (C.A. Op.), Ex. 112 at 9. DeAnn described the bruises as fading and yellowish-green in color (GJ at 52-53) and oval shaped. GJ at 161. There was one big bruise on each side of her chest, and one on her back, about the size of the pad of a thumb, in about the

same position as on the front. One of the bruises wasn't as dark and looked as if it was going away more quickly. GJ at 159-163.

(x) Vas diagnosis. After showing the bruises, Dr. Vas began to diagnose Isis:

> And Veronica's in the kitchen, and she's like diagnosing the baby. She's like . . . calling bruises by their medical terms and she was showing me – she goes look right here, and she was showing these little dots on her face. And uh, she was calling them like "pa tea ke i" or something weird like that – I don't know. She goes and that's what I'm worried about . . .
>
> And uh, so I go and I have my Healthwise handbook and since she told me they were . . . flea bites on her head so I'm looking that up. And I – I don't know what I look up – I think it's insect bites. But in that book it says that they get fevers – and Isis had a fever – . . . they get fever, . . . they get to where they can't breathe . . . I can't remember what all it said – there was like a list of stuff. And I said, Veronica, that's what this says. That's what she's doing. Do [you] think that's what it is? She goes, no, that's [not] what that means. . .
>
> So you know this happened between 3 and 6. And . . . at that – some point we end up in my living room. *And she never did take her in.*

GJ at 53 (emphasis added). Petechiae are small hemorrhages that may be a sign of a bleeding disorder or infection.

b. Thursday, October 26. On Thursday, Isis' condition remained unchanged. She was lethargic and feverish, refused to eat, and continued to have black stool. DeAnn's sister, Mary Guerrero, and Ernie were particularly concerned about Isis' condition.

(i) Housecleaning. DeAnn called Dr. Vas on Wednesday evening to see if she would like DeAnn and her sister to clean her house the next day, and was surprised to find Dr. Vas at home since she was supposed to be at work. However, Dr. Vas approved the cleaning arrangements. GJ at 46. The next morning, DeAnn and her sister Mary Guerrero cleaned Dr. Vas' house while Dr. Vas and Ernie were at work. On the way to the house, Mary saw the marks on Isis' face, which she described as:

> [D]ark red raised marks or sores all over one side of her head. . . [t]he marks were a little smaller than the erasers at the end of a pencil and looked a little like blood blisters, with possibly a darker center. They didn't look like bruises. They looked a bit scabby, but not like scabs that had actually formed. I have never seen anything that looked like this.

M. Guerrero Aff., Ex. 30 at ¶ 7. DeAnn told Mary that Dr. Vas said the marks were healing insect bites. She also told Mary that she and Ernie wanted to take Isis to a doctor the night before, but that Dr. Vas had refused because Isis had bruises on her chest and Dr. Vas was afraid the doctors would think she had been abused. *Id.* at ¶ 8.

When DeAnn and Mary went to Dr. Vas' house, the doors were unlocked and the house had papers and clothes everywhere. GJ at 60. Mary described the house as follows:

> I could not believe we had brought our babies to this filthy house. This was not ordinary dirt or household clutter. There was molded bread and rat poop on the kitchen counter tops, along with baby bottles and nipples. When I opened the refrigerator door, rat poop fell down from the top of the refrigerator door into the refrigerator. There were dog prints on the side of the stove, and there were bottles with old formula and dirty nipples on the highchair, along with mud.
>
> In the rest of the house, there were clothes on the floor, and crayon and fingernail polish scribblings on the walls. The bathroom had a children's potty seat, which was filled with old poop. In the children's bedroom, the crib was filled with clothes, and the crib mattress was on the floor. The children's beds were a mess, and there were medicine samples scattered on the floor and on the children's dresser.

M. Guerrero Aff., Ex. 30 at ¶¶ 9-11; *see also* Aff. of Steve Guerrero, Ex. 31 (few days before Isis' death, Mary very upset and kept talking about marks on Isis' head, bruises on chest and condition of Vas home, including rat droppings).

At the house, DeAnn showed Mary the bruises on Isis' chest, which Mary described as "pink, almost fading." M. Guerrero Aff., Ex. 30 at ¶ 12. Mary noticed that Isis looked thin and did not have rolls and folds like most babies. However, DeAnn thought she might have gained some weight since her stomach was larger than it had been. *Id.* at ¶ 14. When Mary changed

Isis' diaper, the stool was dark chocolate colored, and Isis became upset and stiffened when her diaper was changed. *Id.* at ¶ 13; GJ at 71. At the house, Isis did not eat, slept most of the time, and did not stir when the phone rang right beside her. GJ at 60. Mary felt that something was wrong and talked to DeAnn about her concerns, but DeAnn still had confidence in Dr. Vas' medical judgment. M. Guerrero Aff., Ex. 30 at ¶ 15 (after seeing bruises and condition of house, Mary felt something seriously wrong; DeAnn felt Vas was a doctor and knew what was medically important).

(ii) Thursday afternoon. In the afternoon, Isis still did not eat other than to take an ounce or so of juice with Tylenol, a situation that continued throughout the week:

MB: Ok. Now on Thursday morning, when you fed her about 7 a.m., did she take some formula?

DeAnn: I don't think so cause it was a 4 ounce bottle and it didn't go down.

MB: Was she able to suck?

DeAnn: Yeah, cause when . . . she would take the apple juice she would take that, so yes.

MB: Ok. So after – uh when did you feed her apple juice on Thursday?

DeAnn: Uh well let's see Veronica's the one that started that. Cause she was going to give me – give her an ounce of apple juice and put medicine in it so that started, I guess that started that Thursday night when she took the apple juice . . .
. . .

RK: What had you fed her that morning?

DeAnn: I [had] just been trying to feed her the formula.

RK: Ok. And she – so she ate formula ok at 7:00 . . .

DeAnn: *No, she wouldn't eat – she hasn't eaten yet. That whole week she probably ate all together, including with the apple juice, she probably ate 4 or 5 ounces that whole week from Wednesday.*

RK: *Were you* worried?

DeAnn: *. . . I would make comments that she's not eating and I would tell Veronica that she's not eating and she always told me that she was ok and she always had an – she would tell me why, she would say, well, you know she's teething or she's got an ear infection to tell me why.*

GJ at 66-68 (emphasis added). Isis also continued to be sleepy and to have black stool:

PM: How was Isis acting?

DeAnn: . . . she slept all the time – that's how she acted.

PM: You had her awake uh at least like uh changing diapers and feeding anything . . .

DeAnn: *. . . The reason we would know that she needed a change cause she would poop and it was real black* and you could see it in the lining you know on the side of the diaper it wouldn't leak – leak out of the diaper but you could see it cause the diapers were white.

GJ at 69 (emphasis added). At 3 or 4 p.m. on Thursday, DeAnn changed a "real poopy" diaper, and each time, Isis cried when her diaper was changed, which was very unusual. GJ at 135-136; GJ at 69 (from Wednesday to Saturday, Isis slept "the whole time" except when diaper changed).

(iii) Hand Industrial. Like Mary, Ernie was worried, and he talked about his concerns at work. At that time, Ernie was a mechanic at Hand Industrial, which is owned by Nathan Hand. Mr. Hand's wife, Rebecca (Becky), was the office administrator. Since she had a medical background, Ernie asked Mrs. Hand's advice:

> During the week of October 24th, 2000, Ernie came to work very tired. He said that Dr. Vas' baby, Isis, had come back to their house sick, that he had been up much of the night, and that he was worried about the baby. He was concerned that her illness might be serious or contagious.
>
> Ernie also asked me what flea bits looked like. He said that when Dr. Vas brought the baby back, she had bites all over her head and neck. He said they started above one eyebrow and were almost in a pattern. I asked whether it might be a heat rash. Ernie said the bumps were strange looking and weren't like anything he had seen before. From his description, I wondered about ringworm,

> scarlet fever, chicken pox or any of the other childhood diseases. He also said the baby hadn't been eating and was lethargic.
>
> Ernie talked about wanting to take the kids, including Isis, to the doctor. He said that he had talked to Dr. Vas about the baby's sickness and bumps, but that she said that the baby was okay and that the bumps would go away. He stated she was unconcerned and seemed indifferent. I suggested that if Isis got worse, he should insist that Dr. Vas take her to a doctor.

Aff. of Rebecca Hand, Ex. 27 at ¶¶ 7-9. *see also* Aff. of Nathan Hand, Ex. 28 at ¶ 4 (overheard Ernie telling his wife that the baby was sick; Ernie didn't seem to know what to do and appeared to be seeking Mrs. Hand's advice).

(iv) Thursday evening. Thursday evening, DeAnn looked after the children while Ernie took his oldest daughter, Nikki, to his parents for dinner. Later, Dr. Vas went to sleep on the living room floor with the two older children. GJ at 63-64. Isis slept on the couch, wearing just a diaper. Since Dr. Vas hadn't covered her and it was cold, DeAnn turned on the heater. GJ at 65. During the night, Dr. Vas got up, around 4 a.m., gave Tylenol to Emily, who also had a fever, and went shopping for groceries. GJ at 76-78.

c. Friday, October 27. By Friday, both Isis and Emily were sick, and DeAnn was also becoming concerned about Isis.

(i) Friday morning. When DeAnn and Ernie got up on Friday, Dr. Vas was gone. GJ at 76-78. Since Isis was uncovered, Ernie got a blanket and covered her, which woke her up. When she started to cry, Ernie made a bottle for her before leaving for work. GJ at 79, 141. DeAnn tried to feed Isis, but she wouldn't eat. GJ at 142.

At work, Ernie again talked to Mrs. Hand about the children. At noon, he stayed home. Mrs. Hand assumed he stayed home because the children were sick and he and DeAnn were tired. R. Hand Aff., Ex. 27 at ¶ 10. After Ernie helped DeAnn put the children, including Isis, down for their naps, Ernie also took a nap.

(ii) Friday afternoon. By Friday, Isis hadn't taken any formula for two days. GJ at 79. On Dr. Vas' instructions, DeAnn continued to give her decongestant and Tylenol in juice. GJ at 139; GJ at 178 (gave Tylenol every 4-6 hours). By this time, DeAnn was also concerned:

> I knew something was unusual about the baby but every time I talked to Veronica about it, she always had an excuse for me. I believed her, she was my doctor, and so and this was her child so I just believed her.

GJ at 144 (prosecutors agreed that Dr. Vas knew more about babies than DeAnn or the prosecutors). Since Isis was still sick, Dr. Vas told DeAnn to give Isis antibiotics and breathing treatments prescribed for DeAnn's own children. GJ at 95, 116-123. When Dr. Vas called DeAnn around 4 p.m. on Friday afternoon, DeAnn said that Dr. Vas was "acting weird." GJ at 83. Since DeAnn was concerned about Isis and Emily, DeAnn asked Dr. Vas to come by and check on them before leaving for Michigan:

> [W]hen Veronica called me from her cell phone that afternoon before she left she said – she said should I go, and I said, Veronica, why don't you come by here and see the kids, and you can make your decision. I said Emily still has a fever and Isis still doesn't feel good. She goes, I'll be there in a minute. A few minutes passed, she came up – came in the house. . . I got up, I handed her Isis and she sat down in my rocking chair. And . . . she was holding Isis right there and she put Isis up on her shoulder like that. And uhm Emily got up off the couch . . . walked across the floor and laid in Veronica's lap. And she was holding both Emily and Isis. . . And she was just sitting there – she was kind of rocking and swiveling, and she told me to go out to her car and to get the camera to take a picture of . . . her holding the kids.

GJ at 83. The picture DeAnn took was shown at Ernie's trial. After a silence, in which she made no attempt to examine Isis, Dr. Vas decided to go ahead with her trip:

> DeAnn: . . . she just sat there. . . And I was sitting there and I didn't know what to say. So I was watching the news and so I finally just go, what do you think. . . *She said I think I would be a very bad mother if I went – or a bad person – not mother – person.* And I just sat there and I know what I was thinking but I didn't say anything.
>
> MB: What were you thinking?

DeAnn: I said, yeah. *No, she said selfish, I'm sorry – she didn't say bad, she said selfish. I'd be a very selfish person if I went.* And my mind was going Yeah. But I didn't say it . . . and I guess it was my pride, and I'd look back a hundred times . . .

MB: So you said yeah in your mind?

DeAnn: Yeah, yea – yeah (laugh) I mean my mind was going, Yeah, you are, but I didn't and uh and she – Ernie didn't go back to work that afternoon cause we had been up so much [that] week . . . he just took a nap in the back and I was in the front with the kids, and he had gotten up and he was standing by the bar and Veronica was in the chair and I was on the floor.

And . . . she said, I'd be a very selfish person if I went and then uh and then she's like, should I go and I'm like – I still don't know what to say – I don't say nothing. You know it's my pride again and I just didn't say anything and -- and uh Ernie's just standing there, I'm still sitting in the floor, *and then she – she hops up . . . she hopped up and she goes, I'm going.*

I mean it was not *even* a get up, it was a hop up. And I – cause I had told her I would watch them you know. I will watch them – I mean I already told you I would watch them. I had told her that. And . . . she goes ok, I'm going to go.
. . .

MB: You['re] not answering – did he answer her?

DeAnn: . . . no, he didn't say nothing either. I don't think he was in the room yet. But I don't remember that part. I just know that I felt uncomfortable cause I was on the floor and it was just complete silence in there. That's why I said, what do you think. [5]

GJ at 83-84. Dr. Vas did not leave the Lopezes a medical note, as requested:

MB: . . . when she started toward the door did she stop – did she just keep on going?

[5] In an unsigned statement to the police, Dr. Vas said that she asked DeAnn and Ernie if she should go on her trip. According to Dr. Vas, Ernie said that "kids do get sick sometimes and they would be fine." Police Reports, Ex. 63 at 33. Quite apart from Dr. Vas' difficulties with veracity (discussed below), it is somewhat surprising that a doctor would rely on a mechanic for an evaluation of her child's health.

DeAnn: Uh well, at the bar, I had told her to leave me a doctor's note just in case I needed to leave the kids, and she didn't. She didn't uh stop.

MB: When you say a doctor's note what are you talking about?

DeAnn: Because . . . every time I would go out of town and leave my kids with somebody, I would leave a doctor's note giving them permission to take the kids to the doctor if they needed to. And so I told her if you go I – I want you to leave me a doctor's note just in case I feel I need to take the kids to the doctor.
. . .

MB: Uh, did she leave you a note?

DeAnn: No, she did not.

MB: Ok.

DeAnn: She was like halfway down the street and I go, Ernie, she didn't leave me a note.

GJ at 86-87. Ernie went after her and asked for a note, but Dr. Vas told him that the kids would be fine. *See* Ernie Lopez Aff., Ex. 37 at ¶ 41.

(iii) Friday evening. After Dr. Vas left, Ernie went to pick up Nikki, his oldest daughter, and buy pants for the church play in which he was performing that evening. After dropping Nikki at home, Ernie left for the church play, which was put on by his brother, a youth pastor. GJ at 90. That evening, when DeAnn looked after Isis, she cleaned a large bowel movement, again with black stool. GJ at 154 (DeAnn did not recall seeing any wet diapers that week, only black stool). According to DeAnn, this bowel movement went "everywhere and I'm not kidding – I'm talking everywhere," including the genital area. GJ at 92-93; GJ at 149. DeAnn cleaned stool from the cracks and crevices of the vaginal area. RR 4:109-110 (agreed with State it was a "horrendous defecation," that she cleaned stool from the cracks and crevices, and that stool left in the "vaginal vault" could lead to infection). DeAnn didn't see blood in the

genital area, but said that the area was "red." GJ at 245, 264; see *also* GJ at 92-94 (all three of the children's bottoms were always red). DeAnn put Isis in the baby swing because she thought she had been sleeping too much, and Alex was able to get Isis to smile briefly. GJ at 96, 136, 150. Other than that, for the two days that Isis was with the Lopezes, she didn't interact with the other children or even play with her hands. GJ at 95-96.

Dr. Vas called DeAnn that evening and said that she would call again in the morning at 10:30. GJ at 109. When Ernie got home after 11, Isis was asleep on the couch and Sienna was in her carseat beside the couch. GJ at 7, 98. DeAnn put the older children to bed in the children's bedrooms. GJ at 98. Ernie stayed in the living room to watch television while DeAnn went to bed. GJ at 13.

d. Saturday, October 28: Lopez Home. On Saturday, the Lopezes were having family pictures taken in the afternoon, so DeAnn planned to run a few errands in the morning while Ernie looked after the children.

(i) Saturday (through 10:15 a.m.). On Saturday morning, DeAnn fed Nikki and Emily. At about ten, she woke up Ernie just before leaving to take Nikki shopping. Isis was asleep on the floor, wrapped in a sleeping bag. GJ at 7, 104. Ernie told DeAnn that Isis had fallen off the couch in the night, possibly hitting her head on the edge of the carseat, so he had made her a little pallet on the floor. GJ at 13, 103-104, 168. He changed Isis' diaper, which was sticky and messy, at the same time he made the pallet, and gave her a decongestant and a breathing treatment at about 7 a.m. Ernie Lopez Aff., Ex. 37 at ¶¶ 45-46. Ernie showed DeAnn where he thought Isis might have a little bump or bruise from falling off the couch. GJ at 106. DeAnn thought the skin might be bluish, but it wasn't broken and there was no blood. GJ at

106-7. Isis opened her eyes but looked as if she was going to go back to sleep. GJ at 108. DeAnn reminded Ernie that Dr. Vas was going to call at 10:30. GJ at 109.

(ii) Saturday, 10:15-10:55 a.m. DeAnn left the house at 10:15 a.m. GJ at 7-8. After that, Ernie fed Alex and Cody, and tried to feed Isis. However, Isis choked and gagged on the formula, spitting it up. Since Isis was still irritable, Ernie gave her juice with Tylenol and put her in the swing. When Dr. Vas called at 10:36 a.m., Isis was still in the swing. Ernie Lopez Aff., Ex. 37 at ¶ 50; Vas Phone Records, Ex. 78. After Ernie told Dr. Vas that Isis was still having breathing difficulties, Dr. Vas asked to speak to Alex. Ernie intended to speak with Dr. Vas again, but when he took the phone from Alex, Dr. Vas had already hung up. The call ended at 10:40 a.m. *Id.*

Since Isis was smelly from spitting up and had a messy diaper, Ernie decided to give her a bath. He therefore took Isis to the children's room, which was next to the bathroom, and took off Isis' diaper, which had a few rust colored spots. Since it was only a little messy, he wiped her off with the diaper and took the diaper to the kitchen to put in the trash. Ernie Lopez Aff., Ex. 37 at ¶ 51. He also checked on the other children and tidied the kitchen. E. Lopez Statement, Ex. 61. When Ernie went back to give Isis her bath, he found that she was not breathing. *Id.* He attempted to revive her by slapping her face and bottom, splashing water on her, and shaking her. *Id.* When this was unsuccessful, he started CPR and called 911. He reached 911 at approximately 10:56 a.m.

(iii) 911 call. In the 911 call, Ernie sounds frantic, almost crying. He told the operators that Isis had been sick since being bitten by a spider at her mother's house several days earlier and that she wasn't breathing but her heartbeat was very fast. He continued to do CPR while following the 911 operators' questions and answering their questions. He said it looked as

if she was peeing blood the night before and that she had some blood coming from her mouth and nose, which he was suctioning out with a bulb syringe. He turned her on her side and continued to give CPR, as instructed, until the emergency vehicles arrived at approximately 11:00 a.m. 911 Call Transcript, Ex. 50.

(iv) Reports of emergency personnel. The emergency personnel – four firemen from the Amarillo Fire Department (AFD) and two paramedics and a supervisor from Amarillo Medical Services (AMS) – arrived at the Lopez home shortly after 11:00 a.m.[6] Mr. Neely noted that the baby was very pale, that she had what appeared to be bruises around her neck, shoulders, upper arms and head, that there was a small amount of fecal matter on the lower abdomen, but there was no blood or evidence of bleeding. He noted Ernie's report of spider bites and breathing treatments. He and Greenly started chest compressions. Emergency Reports, Ex. 51 at 6. The other children were in the kitchen and appeared fine, and that there was nothing to indicate that the environment was unsafe. RR 5:12. *See also* Emergency Reports, Ex. 51 at 6, Cocker (AFD) (baby was taking breathing treatments, with Ernie giving the last one at 7 a.m.; notes bruises on the face, neck and arms); *id.* at 7, Faulkner (AFD) (baby pale and appeared to be not breathing; some extolment on sheets and in her hair; appeared to be bruises around the neck, shoulders and head; Ernie said discolorations were spider bites and that the child had been taking breathing treatments); *id.* at 1, Langford (AMS) (confirmed cardiac arrest and noted the history of spider bites earlier in the week; observed "1/2 to dime size bruising, brownish in color on the patient's body" and bluish bruising on the left leg; IV medication initiated in ambulance; Lightsey took a history); *id.*, Woodburn (AMS) (noted bruises to the bilateral upper arms, upper chest, neck and frontal region of the head; Ernie reported spider bites; CPR continued; child still

[6] There was no report in the District Attorney's file from one fireman. Several of the reports are dictated since the District Attorney did not allow Ernie's defense attorneys to copy the reports.

in cardiac arrest at arrival at hospital); *id.* at 2, Lightsey (AMS supervisor) (arrived later; took child's history; Ernie said that Isis had been bitten by a spider and that she had been congested and taking breathing treatments; unexplained bruising around upper part of body and neck; Lightsey spoke to Dr. Vas, telling her to call the hospital). The ambulance arrived at the hospital at approximately 11:30 a.m.. RR 8:30.

B. Hospital Evaluation and Investigation (October 28-31, 2000).

In every false conviction, there is a point at which an investigation takes an almost irrevocable wrong turn. In this case, the investigation took a wrong turn shortly after arrival at the hospital. Within half an hour, the E.R. personnel had concluded that Isis had been abused and sexually assaulted, and by 2 p.m., they had told the police that Isis had vaginal trauma from sexual assault, a detached retina (not noted at autopsy) and was in critical condition from being "shook too hard." *See, e.g.,* Police Report, Ex. 63 at 7, 10, 12, 17. By 2:30 p.m., Ernie had been arrested. As a practical matter, the case was over before the primary caretakers had been interviewed or the laboratory reports evaluated.

In this section, we discuss the events at the hospital in detail. What is most important in this chronology, however, is not what did happen, *but what didn't happen.* The medical protocols make clear that the only definitive evidence of sexual assault is the presence of sperm. Any other findings can be caused by other medical conditions, requiring a complete medical history and elimination of all other possible causes, ranging from inflammation or infection in the genital area to bleeding disorders, dehydration or other disorders affecting the entire body. Police investigatory protocols similarly require a full medical history, including birth records and laboratory reports; investigation of all bruises; evaluation of the family background, including substance abuse and the pre-existing neglect; and consideration of the possibility of natural

disease processes and/or natural death. *See, e.g.,* Hueston Aff., Ex. 10(b) and (c) (U.S. Dept. of Justice guidelines on investigating child fatalities and child abuse). In this case, none of these steps were taken. Despite the existence of old bruises, the medical staff and police (with one or two exceptions) made clear that they were not interested in anything that happened prior to the 40 minutes in which Ernie cared for the child, thereby excluding all possible causes of the child's injuries and/or death other than their own theory that Ernie had raped Isis and shaken her to death shortly before arrival at the hospital.

1. Hospital Arrival and Emergency Room Treatment. Although the chance of survivability was "nil," the E.R. personnel attempted to resuscitate Isis so that her organs could be donated and her mother could come from Michigan to say good bye. RR 8:20-21, 23. Not long after Officer Harmon of the Amarillo Police Department (APD) arrived at the hospital, Michelle Gorday, the chief E.R. nurse and a sexual assault nurse examiner (SANE nurse), told him that the child had signs of sexual assault, and Dr. Levy told him that Isis had injuries consistent with abuse. Police Reports, Ex. 63 at 5-6 (arrival time noted as 11:31 a.m.). Officer Harmon called Chuck Slaughter of the District Attorney's office, who authorized a sexual assault examination after speaking to Ms. Gorday. *Id.* at 6. Although the sexual assault authorization form is difficult to read, it appears that this authorization was given at 12:03 p.m.[7] Sexual Assault Examination Report, Ex. 54.

2. Information Provided by Ernie to Police and Hospital Personnel. When Officer Taylor arrived at the hospital, also at approximately noon, he too was told that the child was not breathing and had suspicious injuries, and that the medical personnel were beginning to believe that she had been sexually assaulted. Police Reports, Ex. 63 at 5, 8. Officer Taylor was

[7] The District Attorney has refused to make a more legible copy available.

assigned to relay information between Ernie and the hospital personnel. In an hour-long interview, Ernie told Officer Taylor that Dr. Vas had brought Isis to their house with spider bites around her face, neck and chest that Dr. Vas said were healing. *Id.* at 8. Ernie reported that Isis had had problems breathing and was receiving breathing treatments at Dr. Vas' direction. *Id.* He said that Isis hadn't been eating well, and that she had very odd, rank and sticky stools, which he had cleaned. *Id.* at 8-9. He said he felt sorry for her because the feces went up inside her. *Id.* at 9. He said that when Isis stopped breathing, he had tried to revive her by slapping her face and shaking her. *Id.* When these efforts were unsuccessful, he started CPR and called 911. *Id.* Officer Taylor relayed this information to the hospital staff. *Id.*

At about 1 p.m., Ernie also gave Dr. Levy "a long detailed account beginning several days prior," including the breathing difficulties. *Id.* at 7. Dr. Levy's notes indicate that Ernie said that Isis had cough/congestion for 3-4 days, had been feeding poorly, had dark, sticky stools since the prior evening, and that he had found her unconscious with pale lips. Hospital Records, Ex. 53 at 22. Dr. Levy noted that Isis was on antibiotics, decongestants and breathing treatments, and that Ernie did not know what had caused the bruising. *Id.* Dr. Levy did not mention the spider bites. *Id.* Although Dr. Levy emphasized Ernie's inability to explain the bruises at the hospital and at trial, Dr. Levy has never explained why he thought Ernie should be able to explain bruises that occurred before arrival at the Lopez home, or why he rejected Ernie's explanation of spider bites, as diagnosed by Dr. Vas. *See, e.g.,* RR 8:25, 28 (knew they were dealing with child abuse because history obtained from one person did not match injuries).

3. <u>Sexual Assault Examination</u>. The reports of the sexual assault examination are inconsistent and cast considerable doubt on the trial testimony of the sexual assault nurses. Since

Ernie's conviction rested entirely on this examination, it is important to understand the sexual examination process.

a. Diagram of Bruises. The sexual assault examination report includes a full body diagram of Isis' bruises. Body Diagram, Ex. 52. This diagram shows brown bruises covering Isis' body, specifically, multiple bruises on her face, two abrasions on her neck, nine bruises on her arms (as if someone has grabbed her), several larger bruises on her chest, two bruises on her hips, and several bruises on her leg. With the exception of two small bruises on her left leg (possibly from efforts to insert the IVs) and one of the bruises on her hip (which is marked as green), all of the bruises are marked as "brown," "yellow/brown" or "brown/green," indicating that they are old bruises, most likely 4-10 days old. Since Isis had only been at the Lopezes for 2 ½ days, this alone should have alerted the medical personnel and investigators to the fact that, if Isis had been abused, she had been abused by someone other than Ernie.

b. Timing of Sexual Assault Examination. The timing of the sexual assault examination is important. Essentially, the medical records give one time line, while the trial testimony gives another. The medical records appear to indicate that the sexual assault examination was approved by the District Attorney at 12:03 p.m. based on information provided by Michelle Gorday. Sexual Assault Examination Report, Ex. 54. This timing is supported by reports from Officers Taylor and Rhyne, who indicated that they were told that there were signs of sexual assault when they arrived at the hospital at 11:59 a.m. and 12:06 p.m. Police Reports, Ex. 63 at 5, 8-10; *see also id.* at 5-6 (Harmon); Hospital Records, Ex. 53 at 18 (E.R. treatment record indicates discharge at 12:20; Gorday notes "exam done"); *Id.* at 48 (pediatric ICU nursing notes written at 12:15 indicate "sexual assault exam completed by emergency room staff").

Photographs of the sexual assault examination were taken in the Pediatric ICU between 12:20 p.m. and 1:30 p.m. RR 5:99 (Gorday) (photographs taken in Pediatric ICU).

As discussed below, however, a very different time line was presented at trial. At trial, the two E.R. nurses, Melissa Fanelli and Becky O'Neal, testified that there was no indication of sexual assault or abnormalities in the genital area until 12:15 p.m., when they attempted to insert a foley and saw a small amount of blood on the posterior fourchette. RR 5:73, 76 (O'Neal); RR 5:57 (Fanelli). At that point, they alerted Ms. Gorday, the chief E.R. nurse and sexual assault nurse examiner (SANE) on duty, who ordered "hands off" until she could obtain permission to conduct a sexual assault examination from the District Attorney. RR 5:68 (O'Neal); RR 5:47-48 (Fanelli); RR 5:90, 96-97. While Ms. Gorday took "an initial look" in the E.R., Ms. Gorday testified that she conducted the examination in the Pediatric Intensive Care Unit (Pediatric ICU), where she took photographs and collected samples. RR 5:99-100. However, the two E.R. nurses testified at trial that Photograph 38, which was the eighth in the series taken in the Pediatric ICU, was an accurate depiction of what they saw in the E.R. RR 5:54 (Fanelli); RR 5:75 (O'Neal). Photograph 38 is, however, taken after Ms. Gorday has prodded the area with a Q-tip in the Pediatric ICU, stirring up blood, as shown in Photograph 36. If this testimony is correct, it means that there were *two* sexual assault examinations: one in the E.R., prior to going to the Pediatric ICU, and another, with photographs, during a 1-1½ hour sexual assault examination in the Pediatric ICU This would be consistent with Ms. Gorday's testimony that she did her "initial work" in the E.R. and took her camera to the Pediatric ICU because she knew they were "pretty extensive and severe injuries" and wanted to get photodocumentation. RR 5:99. Ms. Gorday would not have known anything about the purported "injuries" unless she had conducted an extensive sexual assault examination in the Emergency Room, for a drop of blood on the

posterior fourchette would hardly suggest "extensive and severe" injuries. Nor would the E.R. nurses have been able to testify to Photograph 38 at trial, for they would not have been able to see this area had they called Ms. Gorday as soon as they saw blood in the genital area.

These inconsistencies have several implications. First, if the sexual assault examination was approved at 12:03 p.m. but the nurses did not discover the small spot of blood until 12:15 p.m., this means that there was never any legal basis for the sexual assault examination. Second, from a medical perspective, if the photographs were of a *second* sexual assault examination, not the first, the photographs are improper and misleading, for they would include bleeding and bruising from the first sexual assault examination, which would more than explain any bleeding and disruption given that this was an 11-pound infant with a documented bleeding disorder. Third, if one puts all of the testimony together, it appears that Ms. Gorday may have obtained permission for a sexual assault examination *without any basis for so doing* and may further have conducted a sexual assault examination without taking photographs, and that Ms. Fanelli and Ms. O'Neal supported Ms. Gorday, who was their supervisor, by inventing a story about the discovery of blood during the attempted insertion of the foley "just before" the child went to the Pediatric ICU *See* RR 5:73 (noticed bleeding right before going to Pediatric ICU), RR 5:56-57 (time on chart for attempted insertion of foley is 12:15), RR 5:86 (Gorday supervised Fanelli and O'Neal in their positions as E.R. nurses and as SANE nurses). The only alternative is that there was no sexual assault examination in the E.R. and that the E.R. nurses instead testified incorrectly at trial that they had "seen" injuries they could not possibly have seen, presumably in an effort to support their supervisor as well as the District Attorney. RR 5:54 (Fanelli) (Photograph 38 accurately reflects what she saw in the E.R. that night); RR 5:75 (O'Neal) (Photograph 38 accurately reflects what she saw when she opened her a little wider).

c. Severity of Injuries. After conducting the examination, Ms. Gorday advised Officers Taylor and Rhyne, who were in the vicinity, that the exam showed "moderate" damage to the vaginal area and "minor" damage to the anal area. Police Reports, Ex. 63 at 9 (Taylor) and 10 (Rhyne). At 1:35 p.m., Ms. Gorday gave two rolls of 12-exposure film to Sergeant Burgess, indicating that she would prepare a report after reviewing her photographs and examination notes. By then, according to Sgt. Burgess, she was reporting that there were "moderate to severe" vaginal injuries and "minor or minimal" anal injuries. *Id.* at 18. By the time Ms. Gorday prepared this report, which is undated, she was characterizing the genital injuries as "severe" and the physical abuse as "moderate." Sexual Assault Examination Report, Ex. 54. By trial, the genital injuries had become "severe," with Ms. Gorday testifying that these were the "worst injuries" she had ever seen to a child or adult. RR 5:156; *see also* RR 5:155 ("Never have I seen this severe of trauma"). The danger of such shifts is, of course, the reason that the protocols for SANE nurses require that all paperwork be completed in full before the SANE nurse leaves the area. *See, e.g.,* SANE Protocols, Ex. 114 at 122.

d. Improper Conduct of Sexual Assault Examination. As discussed in more detail in the section on medical evidence, the sexual assault photographs indicate that Ms. Gorday did not understand how to conduct a sexual assault examination on an infant. The purpose of sexual assault photographs is to preserve a record of the condition of the child's genitalia *prior to any touching*. In the sexual assault literature, this is known as "look, don't touch." Because the sexual assault examination itself can cause tears or bleeding, the procedure is very gentle and noninvasive. In this case, it is obvious that Ms. Gorday is violating the protocols by using a Q-tip to "flip the hymen" and "stirring up blood." *See, e.g.,* RR 5:127 (Gorday flipping hymen out of way with Q-tip in photograph 36); Soderstrom Aff., Ex. 2 at ¶ 22 (examination appears to be

stirring up blood). This technique was particularly inappropriate since, by the time of the sexual assault examination, Isis had a documented bleeding disorder, making her even more prone to bruising and bleeding. *See* Sunderland Aff., Ex. 4 at ¶ 12 (posterior fourchette may split and bleed during medical examination of sick child; bleeding would be greater given seriously deranged blood clotting).

e. Photographs. The sexual assault photographs taken by Ms. Gorday are not timed, and Ms. Gorday testified at trial that she did not know the magnification. Nonetheless, the photographs are sufficient to show that Isis was not sexually assaulted. Specifically, the photographs show that (1) there is no external bleeding (confirmed by the reports of the AMS and AFD crews and trial testimony of the E.R. personnel); (2) there is no damage to the outer lips or inner thighs; and (3) the hymen is intact. These findings are inconsistent with sexual abuse, for a violent sexual assault occurring shortly before hospital admission would almost certainly cause substantial damage to the external genitalia and hymen as well as significant hemorrhaging. *See* Soderstrom Aff., Ex. 2 at ¶¶ 23, 33 (hard to imagine sexual assault that would cause type of bleeding portrayed in these photographs without injuring the outer genitalia or hymen; insertion of even small adult finger would almost certainly cause hymenal tear or laceration while exertion of force would likely cause injury to the labia majora and/or inner thighs; absence of injury to inner thighs, labia majora and hymen is inconsistent with abuse); Sunderland Aff., Ex. 4 at ¶ 12 (reports do not indicate trauma to hymen or vagina, which would be expected in penetrative sexual assault; given seriously deranged blood clotting, one would expect extensive hemorrhage had sexual assault occurred).

4. Ernie's Statement. At 1:20 p.m., Ernie started to write out a statement for the police but was too upset to continue. He therefore agreed that Detective Moore could write the

statement for him. While this statement contains much of the information that Ernie gave to Officer Taylor concerning the events from 10:15 to 11 a.m. on Saturday, albeit in a slightly muddled order, Detective Moore deliberately omitted all events and symptoms occurring prior to 10:15 a.m., including the spider bites, symptoms of illness in preceding days, breathing treatments and the fall from the couch, which he felt were irrelevant and/or defensive. RR 5:242-244. Unfortunately, Detective Moore did not realize that the events and symptoms in the days, weeks and months prior to death are critical to the investigation of a child fatality. Hueston Aff., Ex. 10(b) (U.S. Dept. of Justice guidelines for investigating child fatalities).

5. Lab Tests. Since the E.R. personnel were initially unable to obtain a blood sample, the earliest blood samples were taken between 12:08 and 12:30 p.m., a half an hour to an hour after arrival at the hospital. These samples show many abnormalities. As every reviewing physician has noted, the most significant is the elevated prothombin time and PTT-activated times, which measure the ability of the blood to clot. Isis' tests show that as of 12:30 p.m. – when Ms. Gorday had just begun to take the sexual assault photographs in the Pediatric ICU – Isis had virtually no clotting ability and would have bled easily and rapidly. Laboratory Reports, Ex. 55 at 6 (prothombin time of 20.4 seconds, nearly twice the normal range; PTT *greater than 212 seconds, i.e., unmeasurable, as compared to a normal range of* 27-39.7 seconds). When the lab notified Dr. Levy of these results at 1:29 p.m., he gave an order for no anticoagulants and transfusions of fresh frozen plasma to help with clotting. *Id.; see also* RR 8:31 (Levy) (gave plasma to help clotting). Dr. Levy did not seem to consider, however, that the abnormal clotting factors would affect the bleeding during the sexual assault examination and the brain hemorrhages detected in a later CT scan. *See, e.g.,* White Aff., Ex. 1 at ¶¶ 58-62, 105 (given documented clotting disorder, hospital procedures may have caused or aggravated bleeding in

genitalia and brain); Soderstrom Aff., Ex. 2 at ¶¶ 30, 34 (insertion of foley or sexual assault examination may cause bleeding in genitalia, particularly with clotting disorder); Squier Aff., Ex. 3 at ¶ 52 (elongated prothrombin time may contributing to bleeding); Sunderland Aff., Ex. 4 at ¶¶ 6, 8, 12 (seriously deranged coagulation not discussed in hospital records; may contribute to bleeding in genitalia).

In addition to seriously deranged coagulation, other lab results showed that Isis had an infection (elevated white blood cell count), a urinary tract infection (E. coli cultured from the urine), deranged liver function, high potassium, extremely high glucose, and low protein. White Aff., Ex. 1 at ¶¶ 58-59; Sunderland Aff., Ex. 4 at ¶ 6. While some of these features may have resulted from the body's response to severe trauma, none of the reviewing doctors feel that this constellation of symptoms would have occurred within an hour or two of trauma. Instead, the lab results indicate that Isis was a very sick baby for days and possibly weeks prior to hospital admission. *See* White Aff., Ex. 1 at ¶ 59 (Isis was very sick baby prior to admission); Sunderland Aff., Ex. 4 at ¶ 6 (not aware of such markedly abnormal results in child who was allegedly normal two hours previously; such deranged liver function typically requires serious illness of days or weeks).

6. <u>DeAnn Lopez</u>. DeAnn Lopez arrived at the hospital while Ernie was giving his statement. Although she had been Isis' primary caretaker in the days before her death, neither the medical personnel nor the police interviewed her about the child's condition in the days before her death but instead attempted to get her out of the way on the assumption that Ernie would talk more freely if she was not there. Police Reports, Ex. 63 at 19; D. Lopez Aff., Ex. 29 at ¶ 40 (no one at hospital wanted to talk to her about Isis' health or symptoms in days before death; since Isis sick for at least 3 days and possibly much longer, thought doctors and nurses

would want to know about her condition; instead, they only wanted information from Ernie). Since Ernie and DeAnn agreed that the police could search their home, Sgt. Burgess took DeAnn home, where he searched the house, collected soiled diapers and medicines given to Isis in the days before her death, and took photographs. Police Reports, Ex. 63 at 19-21 (collected Isis' diapers, clothing, bedding, and medications, including Cephalex, an antibiotic, prescribed for Sienna and Albuterol prescribed for Cody, as well as over-the-counter ibuprofen and decongestant/cough medicine). Sgt. Burgess did not note any blood or signs of disturbance or other abnormalities at the house. *Id.* DeAnn told Sgt. Burgess of Isis' breathing problems and tried to give additional information about Isis' illness in the days before her death. However, he was not interested. D. Lopez Aff., Ex. 29 at ¶ 41.

7. **E.R. Diagnosis and Ernie's Arrest**. At the end of Ernie's statement, Detective Moore talked to Dr. Levy, who told him that Isis was in critical condition from being shaken too hard. Police Reports, Ex. 63 at 12. The basis for the diagnosis of "shaken baby syndrome" is unclear since the hospital records suggest that a CT scan – the only way, other than an MRI, to detect brain hemorrhages prior to autopsy – was not taken until approximately 7:10 to 7:40 p.m., long after Dr. Levy's diagnosis.[8] Hospital Records, Ex. 53 at 50. Detective Moore felt that this was sufficient information to arrest Ernie since Ernie admitted that he shook Isis in an effort to revive her. Police Reports, Ex. 63 at 12; *compare* White Aff., Ex. 1, Att. A; Shelton Aff., Ex. 20 at ¶ 42 (Mr. Lopez' statement seemed to be exactly what one would expect from someone who had found child not breathing and who had attempted to revive the child; Mr. Lopez appeared to have done extremely well since many people, including many doctors, would not have had presence of mind to use bulb syringe to clear airways). When Detective Moore told Ernie that

[8] The hospital records indicate that, prior to the CT scan, Isis was being massively rehydrated, which can also cause brain hemorrhages.

Isis may have been sexually abused, Ernie was adamant that he had cleaned out the feces that were inside her but had not penetrated deep inside her. Police Reports, Ex. 63 at 12.[9] Detective Moore also told Ernie that Isis was in critical condition, probably caused by the shaking. Ernie was arrested at approximately 2:30 p.m.

8. CPS. While the police were at the house with DeAnn, two CPS workers came to the Lopez home to place the Lopez and Vas children in protective custody. The Lopez children were placed with DeAnn's sister, Mary, while the Vas children were placed with their father, Dr. Shelton, who returned immediately from out of town. *See* M. Guerrero Aff., Ex. 30 at ¶ 18; Shelton Aff., Ex. 20 at ¶ 24. According to CPS, DeAnn told the CPS workers that Isis had bruises when she arrived at the Lopez house on October 25 and that Dr. Vas had said that Isis had been bitten by a spider on Monday, when Dr. Vas' father, Charles Vas, was caring for her. CPS Lopez Investigation, Ex. 67(b) at 2. DeAnn also told CPS that Isis had had bloody stool in the two prior days. *Id.* In a CPS affidavit filed on October 30, Ms. Klaehn, the CPS investigator, indicated that the bruises were yellowish in color. Shelton Custody Dispute, Ex. 66 (CPS Affidavit). Since DeAnn could not further explain the bruises, which did not occur while in her care, CPS removed the Lopez children from their home. CPS Lopez Investigation, Ex. 67(a). When Dr. Shelton arrived, he told Ms. Klaehn that he was in a custody suit with Dr. Vas due to Dr. Vas' neglect and poor decisionmaking. Police Reports, Ex. 63 at 13-14.

9. Dr. Vas Statements to Dr. Levy and CPS. Dr. Vas arrived at the hospital at about 5:00 p.m., accompanied by Dr. Gerstler. Police Reports, Ex. 63 at 22. Dr. Levy reviewed Isis' findings and condition with Dr. Vas in detail. Hospital Records, Ex. 53 at 24. According to contemporaneous reports, Dr. Vas told Dr. Levy and CPS that the marks on Isis' head were not

[9] In a pre-trial hearing, the Court precluded a similar statement at the request of Ernie's defense counsel; however, Ernie provided similar testimony at trial, as did DeAnn.

present when she left Isis on Friday afternoon. Police Records, Ex. 63 at 22 (Levy reported that Vas said bruises on head not present when she left child); Shelton Custody Dispute, Ex. 66 (CPS Affidavit) (Vas denied knowing about forehead bruises). Dr. Vas told Dr. Levy that she was aware of the marks around the neck but did not know what caused them or what they were, and that she didn't know if the bruises in the lower pelvic area were there or not in the day before she left. Police Reports, Ex. 63 at 22. Dr. Vas told CPS that she noticed the back and upper body bruises on Thursday, but could not decide what could have caused them. Shelton Custody Dispute, Ex. 66 (CPS Affidavit). Sgt. Burgess then took pictures of Isis' injuries, including the bruising on the forehead, right temple, neck, right leg, back and buttocks, in Dr. Vas' presence. Police Reports, Ex. 63 at 22. Based on Dr. Vas' failure to report the bruises and information received from Dr. Shelton, CPS concluded that Dr. Vas' two older children, Alex and Emily, were in genuine threat of substantial harm if allowed to remain in Dr. Vas' care. Shelton Custody Dispute, Ex. 66 (CPS Affidavit).

10. <u>Pronouncement of Death and Organ Harvest</u>. Isis was pronounced dead at 10:45 a.m. on Sunday following a brain scan, but she remained on life support for organ harvesting. Dr. Levy's notes indicate that organ donation was discussed with Judge Dysart (the Justice of the Peace responsible for determining the cause and manner of death), the investigative agencies, and a forensic pathologist in Dallas (presumably Dr. McClain). Hospital Records, Ex. 53 at 25. After further consultation with the Dallas Medical Examiner's office, Dr. Levy and Judge Dysart decided to permit harvesting of the liver from Isis. Police Records, Ex. 63 at 23. The organ harvest was conducted by a team from UCLA at approximately 4:30 – 5:40 p.m. on Sunday. *Id.*

11. Additional Interviews with Dr. Vas. After Isis' death, Dr. Vas immediately began contacting Judge Dysart, who was responsible for determining the cause of death. *See, e.g.,* Vas Phone Records, Ex. 78 (Vas called Judge Dysart at home at approximately 8:30 p.m. on Sunday, October 29, the day of death, and spoke to him for about 20 minutes); Campos Reports, Ex. 65 at 6 (Dr. Vas went to see Judge Dysart few days after Isis' death, wanting him to say that Ernie was responsible for Isis' death). Dr. Vas was less willing to talk to law enforcement, however, scheduling her first interview at 11 p.m. on Monday, October 30.[10] Police Reports, Ex. 63 at 14. Dr. Vas' friend, Dr. Mary Ann Franken, was also present at this interview, when Dr. Vas admitted for the first time that Isis' forehead marks were present before she took Isis to the Lopezes. *Id.* Dr. Vas said that Isis had woken up on Monday, October 23, with eight red, pussy spots on her forehead that Dr. Vas felt were bug bites. According to Dr. Vas, these marks began to dry out and were looking better by Tuesday. *Id.* Dr. Vas said she saw a small bruise on Isis' right shoulder and a red mark on the left side of Isis' neck on Thursday evening, which she thought was possibly a yeast infection from formula spilling during feeding. Dr. Vas said that Isis was being given breathing treatments, antibiotics and Pedialyte, confirming that Isis was sick before hospital admission. *Id.;* Ex. 71, GJ at 223 (DeAnn agreed that Dr. Vas told her to give Isis breathing treatments and antibiotics but did not recall any mention of Pedialyte).

At the interview, Officer Haney learned that DeAnn had taken a picture of Dr. Vas and the children, including Isis, on Friday, just before Dr. Vas left for the airport. While he arranged to have the camera overnighted from Michigan to Amarillo, Dr. Franken told him that Dr. Vas had locked herself in the garage. Police Reports, Ex. 63 at 15. When Officer Haney went to the garage, he saw Dr. Vas smoking a cigarette in the garage and walking away from the door.

[10] The police report indicates this interview took place at 11 p.m. It is possible, however, that this was a mis-print, and that it actually occurred at 11 a.m.

When Officer Haney asked her to open the door, she sat down on the floor. Since he was concerned for her safety, Officer Haney eventually broke the door open and called another officer to take pictures of the damage. *Id.* Officer Haney later returned with an affidavit for Dr. Vas to sign. By that time, Dr. Vas' family law counsel was present and Dr. Vas refused to sign the affidavit, pending review by Dean Roper, Dr. Vas' criminal counsel. *Id.* Dr. Vas testified at trial that she never signed the affidavit, on advice of counsel. RR 7:14.

12. Autopsy. Two Amarillo police officers attended Isis' autopsy in Dallas, which was scheduled for Monday, October 30, but postponed to Tuesday, October 31, since the ambulance carrying Isis' body was delayed due to a 23-car collision. Police Reports, Ex. 63 at 23; Amarillo Globe Newspaper Articles, Ex. 81. The Dallas Medical Examiner's office was provided with the incident report, Ernie's statement, the hospital records and two blood vials. Police Reports, Ex. 63 at 25. Sgt. Burgess discussed the events surrounding the incident with Dr. McClain, the pathologist who conducted the autopsy. *Id.* It is unclear whether Dr. McClain was told that the bruises had been present for several days prior to hospital admission and that Dr. Vas had diagnosed them as spider bites. It is also unclear whether Dr. McClain was aware of the child's symptoms or laboratory results.

The autopsy included an initial examination with x-rays. Dr. McClain noted the multiple bruises previously described (with a few variations, including a change from "brown" to "blue") and a red oval-shaped abraded area on the back of the neck, not noted in the hospital reports. *Id.* Dr. McClain did not find the detached retina noted by Dr. Levy at the hospital or the fractured clavicle to which Dr. Levy testified at trial. Dr. McClain confirmed trauma to the brain (primarily in the back and base of the brain) and to the vaginal and anal areas. She removed the

brain and eyes for more extensive examination and took tissue samples of the bruised areas to be examined microscopically. Both the medical examiner and Sgt. Burgess took photos. *Id.*

13. Complaint. The same day as the autopsy, Detective Haney and an Assistant District Attorney signed a Complaint for Aggravated Sexual Assault against Ernie. Complaint, Ex. 62. The Complaint states that Dr. Darrell Morgan (who is not mentioned in the hospital records) and Dr. Eric Levy found evidence of sexual assault, and that Ms. Gorday found bleeding and bruising in the genitals less than two hours old. The Complaint describes numerous bruises, a detached retina (not found at autopsy) and retinal hemorrhages that the doctors stated could only result from violent physical abuse such as shaking. The Complaint states (incorrectly) that Ernie said in his statement that DeAnn was gone for 1 ½ hours when he called 911. Ernie was arraigned and bail was set at $200,000.

C. Post-Complaint Investigation (November 1, 2000 – April 2003)

Nearly 2½ years elapsed between Isis' death and Ernie's trial for aggravated sexual assault. It is now nearly six years after Isis' death, and Ernie is still awaiting trial for capital murder. There has been ample time for a full investigation of Isis' injuries and death. Yet even today, the cause of Isis' injuries and death have not been properly investigated. Most striking, Ernie's trial counsel still have not subpoenaed or otherwise obtained the medical records and photographs needed for a proper investigation. Despite the lack of medical information, however, the evidence of Ernie's innocence mounted in the 2½ years between his arrest and his trial for aggravated sexual assault, as did the evidence of Dr. Vas' negligence and poor judgment. Some of this information was volunteered by people who knew Ernie and/or Dr. Vas. Other information was gathered by Ted Campos, a former homicide investigator for the Potter and Randall Counties Special Crimes Unit, who conducted an investigation at the request of Ernie's

counsel.[11] While the evidence collected by Mr. Campos was largely ignored, it is an excellent guide to what a proper investigation – and defense – would have looked like.

To understand the deficiencies in the investigation, we will first describe the established protocols for investigating child fatality and child abuse cases. We will then discuss the information that became available during the 2½ years between Ernie's arrest and conviction.

1. Investigatory Protocols. The protocols for investigating child fatality and/or abuse cases are set forth in the Department of Justice Portable Guides entitled "Investigating Child Fatalities" and "Recognizing When a Child's Injury or Illness is Caused by Abuse." Hueston Aff., Ex. 10, Atts. B and C.

a. DOJ Guide: "Investigating Child Fatalities". The protocol for investigating child fatality cases was developed by Lieutenant Bill Walsh of the Special Investigations Division of the Dallas Police Department (Crimes Against Children Unit). This Guide emphasizes that the tragedy of an unexpected child death is compounded if law enforcement conducts a flawed investigation:

> If the investigation is flawed, two outcomes – neither acceptable – are very real possibilities. **The first is that an innocent person will be suspected or accused of either a crime that did not occur or a crime for which the person bears no responsibility.** The other possibility is that a real crime will remain undetected or unsolved, and the person responsible for the fatal maltreatment of the child will never be identified or prosecuted.

Hueston Aff., Ex. 10(b) at 1 (emphasis added) (*Investigating Child Fatalities*); *see also* Ex. 10(b), Forward and p. 2 ("[p]rofessionally conducted investigations of child fatalities ensure that innocent people are not falsely accused of wrongdoing and guilty people are not allowed to

[11] After an initial investigation, Mr. Campos felt that Charles Vas, Dr. Vas' father, should be further investigated since Isis was bruised while in his care and that a complete review of the medical records was needed to determine the cause and timing of the child's injuries, as well as the cause of death. Neither of these investigations was conducted.

escape justice and possibly harm another child"). A proper investigation includes the following considerations.

(i) Acute v. chronic maltreatment. Acute maltreatment (including shaken baby syndrome) arises when the death is directly related to injuries suffered as a result of a specific incident of abuse or act of negligence. Often, there is no previous sign of abuse or neglect. *Id.* at 3. In chronic maltreatment, the death is related to injuries caused by abuse and/or neglect occurring over an extended period. In such cases, there are usually indications of previous maltreatment, including old and new injuries and signs of neglect, including deprivation of food. *Id.* In this case, there were many signs that Isis was chronically neglected – not by Ernie or her other caretakers, but by Dr. Vas.

(ii) Delayed death. The Guide points out that, unlike most adult homicides, child deaths are often delayed, particularly in cases of head trauma or internal injuries to the chest and abdomen. *Id.* at 4. Delayed death may also occur from medical complications arising from initial injuries. *Id.* Often, symptoms of internal injuries do not appear for hours or days after the injuries were inflicted. *Id.* at 6. When a child dies from abuse while in the custody of a babysitter, the investigator's challenge is to determine whether the acting caretaker committed fatal abuse or the child's parents committed abuse that resulted in delayed death. *Id.* at 7. This case had all the indicia of delayed death: head trauma, internal and/or abdominal injuries (evidenced by chest bruises and black stool), symptoms for several days prior to death, and a variety of complications, including dehydration.

(iii) Witness interviews. The Guide emphasizes that all witnesses, including parents, caretakers and others, must be interviewed *before* the autopsy is conducted and a final ruling issued, to avoid providing an offender the opportunity to rehearse statements or destroy

evidence. *Id.* at 9 (emphasis in original). Potential witnesses include the deceased child's siblings and parents, other family members, caretakers, neighbors, medical providers and anyone else who may have relevant information about the child or events leading to the injury or death. *Id.* at 13. Even very young children should be interviewed since they may provide information that will give investigators a possible lead for the investigation. *Id.* at 15. Investigators must refrain from making assumptions or from drawing conclusions based on a witness's behavior, attitude or emotional state since people react differently. *Id.* Investigators must also remember that their role is to get information, not to give it. *Id.* at 16. In this case, the State violated these protocols by failing to interview DeAnn, Isis' primary caretaker in the days before her death; sharing all information with Dr. Vas, giving her the opportunity to prepare a defensive story; and making unwarranted assumptions that Ernie was giving false information, despite the fact that all of the information he gave was corroborated.

(iv) Explanations for death (including child suspects). Investigators must initially entertain *every possible explanation* for the child's death in order to ultimately identify the correct one. *Id.* at 10 (emphasis in original). This includes consideration of all possible medical explanations as well as the possibility that a child's fatal injuries may have been caused by another child. *Id.* at 8. In this case, there were numerous signs that Isis was seriously ill for days and possibly weeks before her death, and that her older sibling was unusually aggressive and unsupervised (discussed below).

(v) Experts. Since prosecution of fatal maltreatment cases often turns into a "battle of the medical experts" that will largely determine the defendant's fate, it is the investigator's responsibility to conduct witness interviews and gather background information that will reduce the jury's reliance on the opinions of medical experts. *Id.* at 13. In this case, the State did not

obtain, ignored or excluded this type of information, forcing the Court and the jury to rely exclusively on the testimony of medical experts. Moreover, since Ernie's counsel did not present expert witnesses, there was no "battle" of the medical experts; instead, it was simply a coup.

(vi) Medical information. Investigators must obtain all information relating to the child for 72 hours prior to hospital admission, making sure to elicit all relevant facts. *Id.* at 16. They must also obtain medical records for the child's life, including birth records, growth charts, x-rays, regular pediatrician checkups, and emergency room treatment, as well as records of all prior investigations involving the child, siblings, parents and caretakers. *Id.* at 17. In this case, the State deliberately ignored all information on the child's condition prior to the hour in which she was in Ernie's care.

(vii) Documentation. The official case file must document the entire investigation, including copies of all official police reports, investigators' notes, medical records, the autopsy report and pictures, crime scene pictures, the 911 recordings, witness statements, search warrants, newspaper articles, background information, and any other relevant information or records obtained during the investigation, including CPS files. *Id.* at 20. Most of this information will be subject to the defense attorney's discovery. *Id.* In this case, however, the case file was very thin, not all what the defense investigator, Mr. Campos, a former homicide investigator, had expected. *See* Campos Reports, Ex. 65 at 1 (file very small compared to what he anticipated a homicide investigation file to be; photographs were black and white, so color of bruises could not be determined).

(viii) Reminders and "red flags". The Guide includes reminders that: (1) an unreasonable delay in seeking medical attention is a "red flag" that the child's injuries may have been caused by abuse; (2) it is not uncommon for severely injured children to die days or weeks

after the original injury; (3) children should not be automatically excluded as potential suspects; (4) the three keys to a successful child fatality investigation are effectively conducted and well documented witness interviews, careful background checks of everyone involved, and competent interrogation of suspect(s). *Id.* at 25. In this case, Dr. Vas' refusal to obtain medical attention for Isis was a "red flag" for pre-existing neglect and/or abuse. Despite this red flag, the investigators did not investigate the bruises or events occurring while in her mother and/or grandfather's care. They also failed to conduct careful witness interviews, background checks and interrogation of *all* suspects, including Dr. Vas and her father, and ignored the possibility that the original injury was caused by the other children in the Vas household, who were largely unsupervised while in Dr. Vas' care.

(ix) Conclusion. The Guide concludes with a reminder that the investigators' job is not only to ensure that those who are guilty of neglect or abuse resulting in a child's death are identified and held responsible, but to ensure "that innocent people are not improperly suspected, arrested, charged, or convicted." *Id.* at 26. In this case, the failure to conduct an adequate investigation resulted in the false conviction of one of the few people who cared about Isis.

b. DOJ Guide: "Recognizing When a Child's Injury or Illness is Caused by Abuse". Although slightly outdated, this Guide provides minimum protocols for distinguishing between abuse and accidental injury or illness. Hueston Aff., Ex. 10(c).

(i) Bruises. All bruises must be investigated. *Id.* at 2. The color of the bruises may suggest age, e.g., yellow/brown bruises are typically 7-14 days old, while the configuration of bruises may suggest the instrument used, including hands. *Id.* at 5-6. Bruises may also, however, be explained by blood clotting disorders, which require blood tests and skilled interpretation. *Id.* at 7. In this case, there has never been any explanation of Isis' brown bruises,

some of which look remarkably like fingertip and/or hand marks. The relationship between the bruises and the child's clotting disorder has also been ignored. *See, e.g.,* Sunderland Aff., Ex. 4 at ¶¶ 15, 10 (marks on face could be resolving finger-tip/knuckle marks; however, given deranged coagulation, one should interpret skin bruising with extreme caution).

(ii) Assessment of mother. The investigation should include an assessment of the mother's pregnancy, labor and delivery and general attitude towards the child. *Id.* at 3, 15. In this case, the records indicate that Isis was unwanted by both birth parents and seriously neglected by her mother.

(iii) Medical records. Information about a child's birth and his or her neonatal and medical history are critical elements in any investigation since these can suggest or eliminate the existence of birth injuries. *Id.* at 3. Congenital or hereditary abnormalities should also be addressed. *Id.* at 3. Although the police subpoenaed Isis' birth records for the grand jury, Ernie's defense counsel did not obtain these records or have them reviewed by a medical expert. As a result, alternative causes of Isis' symptoms and death (including heart disease) have never been explored, even though there was a strong family history of heart disease, and Dr. Vas used Paxil when she was pregnant with Isis. *See, e.g.,* Pediatric Records, Ex. 57 at 14 (strong family history of heart disease); Medications, Ex. 58 (FDA Advisory of Risk of Birth Defects with Paxil; link between prenatal use of Paxil and heart defects in infants).

(iv) Other factors. Factors that increase the likelihood of abuse include premature birth, low birth weight and living in environments with substance abuse. *Id.* at 3. In this case, Isis was born three weeks before her due date, had a low birth weight, and lived with a mother whose behavior suggested substance dependence and/or abuse.

(v) Head injuries. The signs and symptoms of head injuries, including subdural hematomas, may be nonspecific, including irritability, lethargy and disinclination to eat. *Id.* at 10. Isis displayed all of these symptoms in the days prior to her death.

(vi) Internal and abdominal injuries. The Guide notes that internal injuries, such as abdominal injuries, are second only to head trauma as the most common cause of death in child abuse cases. *Id.* at 11. The chest bruises and black stool suggest that Isis may have suffered abdominal injuries prior to arrival at the Lopez home.

(vii) Possibility of natural death. The Guide divides child deaths into three general categories: (i) SIDS (sudden infant death syndrome);, (ii) other causes, including medical causes; and (iii) suggestive/diagnostic of child abuse. *Id.* at 12-17. In this case, SIDS is less likely since Isis was not healthy prior to her death. In considering natural or accidental causes, the investigators must look for diagnostic signs of a disease process (such as lab tests), signs of a "sickly" or "weak" baby, unsanitary conditions in the home, and subtle changes in liver, adrenal glands and heart muscle at autopsy. Signs that suggest child abuse include skin injuries; evidence of malnutrition or neglect; unwanted pregnancy; little or no well-baby care; use of cigarettes, drugs and/or alcohol during and after pregnancy; deviant feeding practices; chaotic or unsanitary living conditions; external bruises; and abnormal body chemistry values. Isis had most of the signs of natural/accidental death and *all* of the signs of abuse prior to her arrival at the Lopez home.

(viii) Investigator checklist. This checklist includes assessments of the child's family history, including parental substance abuse and marital status; the possibility that the child is a "target child"; any delay in medical treatment; location, configurations and distributions of bruises; determination of whether the injuries appear to have been caused by the hands or an

instrument; and evidence of multiple injuries in various stages of healing. *Id.* at 18. In this case, there were many red flags for neglect and/or abuse by Dr. Vas. Indeed, virtually all of the listed factors were present. In contrast, throughout this entire case – which now spans nearly six years – there have never been any indications of abuse or neglect in the Lopez home. To the contrary, all of the evidence gathered prior to trial – and since trial – confirms that Ernie and DeAnn were excellent caretakers of their own children, as well as the Vas children. Even in prison, Ernie has continued to be a strong, supportive parent to his children.

As this suggests, everyone with investigatory responsibility in this case – the medical personnel, the police, the District Attorney's Office, and Ernie's defense counsel (with the notable exception of Mr. Campos, whose findings were ignored) – violated virtually every precept set forth in the investigatory protocols and failed in their responsibility to Isis, to Ernie and his family, and to the public. It is now nearly six years after Isis' death – and no one has yet made any serious effort to determine *what* happened to the child, let alone *who, if anyone*, was responsible. Indeed, it appears that no one has yet obtained or reviewed the full medical records, which should have been the starting point for the investigation. In this section, we show that the information that did become available prior to trial should have alerted the State and Ernie's defense counsel that there were many possible causes of Isis' injuries or death and that a complete review of the medical records was therefore essential.

2. <u>State Investigation</u>. Once the Complaint for aggravated sexual assault was filed, the investigation appears to have virtually stopped. Indeed, apart from the interview with Dr. Vas, it appears that the only interviews that were conducted were of people who arrived voluntarily at the police station or (later) at the District Attorney's office. Police Records, Ex. 63 at 13-17. Thus, the police were contacted by Pat Turner, the former neighbor who reported Isis'

inability to move her arm on October 6; Lorrie Word, who reported that Dr. Vas had previously left Isis unattended and that Isis appeared to have lost weight by mid-October; and Tommy Lopez at Hand Industrial, who reported that the baby had been sick in the days before she died and that there were concerns with her mother. The police also met with Mr. Langford, Amarillo Medical Services, who told him that, in addition to the information in his report, someone had said that Isis' stool was black and sticky (often a sign of abdominal injury) and that she had some bleeding from the rectum as the firemen worked on her (suggesting that the bleeding could have been the result of CPR, rather than sexual assault). At about that time, the police records indicate that Dr. Vas had been admitted to the Pavilion, a mental health facility in Amarillo, and was being transferred to a similar facility in Indiana. The police also sent a grand jury subpoena to Dr. David, who delivered Isis, and received medical information from Dr. Carmen Werner, Isis' pediatrician. Trial counsel never obtained the birth records and apparently received the pediatric records during or shortly before trial.

3. CPS Investigation: Lopez Family. Although the police essentially stopped their investigation when the Complaint issued, CPS continued its investigation of the Lopez family since the Lopez children were in protective custody. The CPS record begins on October 28, 2000 and continues through January 2002. This record is helpful both because it contains contemporaneous information on Isis' death, including statements by Ernie and DeAnn, and because it provides detailed observations of DeAnn and Ernie's strong parenting skills.

a. CPS Affidavit (October 30). In an October 30 affidavit, CPS states that it removed the Lopez children from their home and mother because "[t]here were older bruises on Isis that have not been explained at this time." CPS Lopez Investigation, Ex. 67(a). The Lopez

children were taken from their parents, in other words, because they could not explain the bruises that occurred while Isis was in her mother and grandfather's care.

b. CPS Investigative Report (November 9). In its November 9 report, CPS states that Isis had older yellowish bruises on her forehead, neck, shoulder and left arm, newer black and purplish bruises on her eyes, arms, upper legs, rib and stomach area, and a tear on the lower back. CPS Lopez Investigation, Ex. 67(b). The "newer" bruises and tear do not appear in any hospital records, and are inconsistent with the hospital chart, which (with minor exceptions) records the bruises as "brown," "green-brown" or "yellow-brown." Body Diagram, Ex. 52. The CPS report indicates that Isis had "minor" rectum and "moderate" vaginal trauma, consistent with Ms. Gorday's initial reports, and that Isis suffered from shaken baby syndrome. CPS Investigation (Lopez), Ex. 67(b).

This report also contains CPS reports of interviews with Ernie and DeAnn on October 28 – Ernie at the hospital, and DeAnn at the house. Ernie gave CPS the same information he had given to the police and Dr. Levy. DeAnn's interview is significant since it is the earliest interview of DeAnn. At the house, DeAnn reported that Isis had older bruises when she came to their house, that Dr. Vas said Isis had been bit by a spider, and that Isis had bloody stool in her diapers on the Thursday and Friday before hospital admission. CPS Lopez Investigation, Ex. 67(b); *see also* Ex. 67(a) (CPS affidavit describing interviews with DeAnn and Ernie). The November 9 report also contains the information provided by Gayle Turner, including Isis' inability to use her right arm and Dr. Vas' refusal to allow Ms. Turner to take Isis to the doctor. CPS Lopez Investigation, Ex. 67(b) at 3.[12]

[12] The medicine in the diaper bag was baby aspirin for Sienna that Dr. Vas had indicated could be used for Isis, who wasn't well.

A CPS-ordered family assessment of DeAnn, the Lopez children, and DeAnn's sister and brother-in-law (who now had custody of the Lopez children) was favorable, with the evaluator reporting that DeAnn was good with the children and that the children were bonded to her. Lopez Family Assessment, Ex. 69 ("Acker report"). The evaluator found that Mary and Steve Guerrero would ensure the safety of the children but expressed concern with DeAnn's ability to protect the children given her belief that Ernie did not harm Isis and failure to report Dr. Vas' severe neglect of her children.

c. CPS Investigation of Ernest Vas (Dec. 9, 2000). In addition to confirming DeAnn's earlier reports of pre-admission symptoms (e.g., spider bites and bloody stool), the CPS log of the initial investigation notes that *the older, yellowish bruises on Isis' forehead, neck, shoulder and left arm were "approximately 4 to 5 days old."* CPS Lopez Investigation, Ex. 67(c) at 4 (emphasis added). Since Isis was only at the Lopezes for 2½ days prior to hospital admission, this placed the bruises within the period of time that Isis was in her mother and/or grandfather's care.[13] Based on the age of the bruises, CPS no longer attempted to blame Ernie for the bruises, but instead criticized DeAnn for failing to report Dr. Vas' negligence. *See, e.g.,* CPS Lopez Investigation, Ex. 67(c) at 8-9.

In the CPS meetings, DeAnn also told CPS that Dr. Vas never cleaned her house and did not provide adequately for her children. DeAnn found some of Dr. Vas' behaviors to be bizarre but hadn't thought much of it because Dr. Vas was a doctor. *See, e.g., id.* at 6 (DeAnn reported that Dr. Vas picked up food off the ground and said she was taking it home for the children to eat later; Dr. Vas did not take children to the doctor when they were sick or Isis was due for checkups; left children with Lopezes most of the time). DeAnn said that she and Ernie

[13] This report also indicates that DeAnn initially reported that she left the house at 10:30 a.m., not 10:15, which would make the State's time frame even less credible. CPS Lopez Investigation, Ex. 67(c) at 5.

sometimes had disagreements but that Ernie was "wonderful with the children." *Id.* The log states that the Lopez children were very bonded to DeAnn, and that Cody screamed and wouldn't let go of his mother at the end of visitation. *Id.* at 5.

The report also includes a summary of the Acker report; a call by Gayle Turner (Isis was sleepy and seemed sedated several weeks before her death; would not use right arm; Turner asked to take her to the doctor but Vas said she would handle the arm and medication issue later); and discussions with Dr. Shelton (who reported severe aggression by Alex and acting out behavior by both children). *Id.* at 6-7.

The CPS investigation of the Lopez family ultimately determined that:

- The Lopez children received proper care;
- Dr. Vas was not meeting the children's physical and medical needs and the Lopezes did not do anything to intervene;
- DeAnn did not recognize the neglect by Dr. Vas or the probability that Ernie was responsible for Isis' death (though not her bruises);
- Dr. Vas' children received adequate care by DeAnn but did not receive appropriate care by Dr. Vas;
- Deann and Ernie allowed Dr. Vas' inappropriate care to continue;
- Ernie was responsible for the injuries causing Isis' sexual abuse and death (a conclusion apparently based entirely on the initial E.R. reports);
- Ernie and Deann have many friends and family who support them, and
- DeAnn is able to access resources to provide for her and the children.

Id. at 8-9 (further concluding that DeAnn was guilty of negligent supervision due to witnessing neglect by Dr. Vas and not intervening or reporting it and allowing it to continue, and that DeAnn needed to be able to acknowledge her role in the neglect of Dr. Vas' children, as well as the possibility of Ernie being responsible for Isis' death). *Id.* In short, CPS found that Ernie and DeAnn should have reported Dr. Vas – DeAnn's own doctor – to CPS, a requirement that turns

the child abuse reporting requirements upside down: in Texas, as in most states, *doctors* are usually required to report likely abuse by their patients, not the other way around.

As a result of this investigation, CPS notified DeAnn that she had negligently supervised the Vas children, presumably by failing to report Dr. Vas' negligent childcare practices, and that they would be offering her services to remedy the problem. CPS Lopez Investigation, Ex. 67(d) (with *pro forma* letter to Ernie stating that CPS had concluded that there was reason to believe that he had physically abused all six children and sexually abused Isis; no supporting evidence provided or contained in file).

d. CPS Family Reports, November 2000 – October 2001. This log describes in detail each CPS family visit with DeAnn (November 2000 - January 2001) and with both Ernie and DeAnn (February to October 2001). CPS Lopez Investigation, Ex. 67(e). In a November 7 meeting, DeAnn described in detail Isis' condition in the months before her death. *Id.* at 3 (Isis initially a happy baby, always smiling and in a good mood; however, sick for a long time with fever; one time, Dr. Vas thought she might have pneumonia but did not take her to a doctor). DeAnn also described Isis' symptoms in the days before her death, including her bruises, breathing difficulties, and failure to eat (total of 4 ounces from Wednesday to Sunday). *Id.* DeAnn said that she thought Isis was already dying, but that DeAnn did not know it and that Dr. Vas would not take her to a doctor because of the bruises. *Id.* This report also contains DeAnn's reports of her initial contacts and general experience with Dr. Vas, including Dr. Vas' deceptions; lack of professionalism at DeAnn's doctor appointments; unsanitary habits (such as picking up cookies from horse barn to feed to children later); filthy house (mouse feces on kitchen counter and spiders everywhere); and lack of discipline (e.g., Alex squirting ketchup at Dr. Vas' house while Isis screamed and Dr. Vas slept). *Id.* at 4-5. DeAnn also described Ernie's

care of Isis. *Id.* at 4 (Ernie felt sorry for Isis because her dad didn't want anything to do with her; loved and treated Isis as his own child). Based on these reports, CPS indicated that "DeAnn expressed more realization she should have done something regarding Dr. Voss's [sic] care of the children" and that DeAnn was beginning to express "some feelings of guilt." *Id.* at 5.

Despite their apparent belief that Ernie was guilty, the CPS evaluators could not fault Ernie or DeAnn's parenting. To the contrary, they consistently reported that the Lopez children were doing well and that both DeAnn and Ernie had strong parenting skills. By May 10, 2002 – when Ernie had been released on bond and was living with his family for three months – CPS could find no fault with either parent or any need for services by the children. To the contrary, CPS reported that:

> The children have been observed frequently in the family home. They appear bonded to the parents and no specific indications of abuse or neglect have been noted. The Department is not offering any other services to the children.

CPS Lopez Investigation, Ex. 67(f) at 4.[14] The CPS reports between May and October 2001 also describe strong parenting skills and a close bond between the children and both parents. After Ernie's indictment, CPS ended its supervisory role because there were no grounds for finding neglect or abuse by Ernie or DeAnn. *See* CPS Lopez Investigation, Ex. 67(g).

4. <u>CPS Investigation and Family Court Rulings: Vas Children</u>. Materials from a variety of sources have also enabled us to piece together a reasonably accurate picture of what the State learned about the Vas household between Ernie's arrest and trial.

a. <u>CPS Investigation of Dr. Vas (Nov.-Dec. 2000)</u>. In its investigation of Dr. Vas, CPS found that Dr. Vas had no previous history with CPS but that:

[14] Despite these uniformly positive observations, CPS asked the Court to order Ernie to participate in a sex offenders group based on their apparent belief that Ernie was guilty. The Court denied the request.

> [T]here has been information gathered to show Dr. Veronica Vas' children have been neglected and possibly abused that was not reported to the department. Isis suffered from a possible injured right arm that Veronica did not seek medical attention for about three weeks prior to her death. Isis was found home alone by a baby sitter and it was undetermined how long she had been home alone. Dr. Veronica Vas has a very dirty house as reported by past babysitters and allowed Alex to [wander] out front on 9th street unattended.

CPS Vas Investigation, Ex. 77 at 4. Unlike the Lopez children, moreover, the Vas children continued to have problems. Thus, the CPS Log indicates that Alex continued to be very aggressive, had choked and kicked his dog, and had grabbed Emily and shaken her when he was angry. *Id.* at 4-5 (Emily had also shaken and slammed her baby doll and repeatedly poked it in the vaginal area, possibly because she herself had received a sexual assault examination at Northwest Texas Hospital).

The CPS report details the familiar concerns with Dr. Vas' mental stability and parenting, as reported by several interviewees. Dr. Shelton described Dr. Vas' lack of veracity, inability to care for the children, general neglect (including leaving Isis unattended and the older children unsupervised in the yard and on 9th Street), and recent threats to kill herself and the children. *Id.* at 5. CPS did not take action on these threats but instead told Dr. Shelton that he was responsible for ensuring the children's' safety. *Id.* at 3; *see also* Shelton Aff., Ex. 20 at ¶ 26. CPS also reported a conversation with Dr. Werner, Isis' pediatrician:

> [Dr. Werner] had concerns about Dr. Veronica Vas's choices, but never had enough to report abuse or neglect. Dr. Werner states that Dr. Veronica Vas missed her four month appointment with Isis. When Isis was seen at 5 ½ months, she was on the lower end of the growth chart and this was concerning. Dr. Vas was not caring for the children properly due to her work schedule, so Dr. Werner asked her to educate the babysitters of the children. Dr. Vas would bring the children to her rotations during medical school at the hospital and have others watch them. Dr. Werner spoke to Dr. Vas multiple times about poor choices and the need to take better care of her children.

CPS Vas Investigation, Ex. 77 at 7. In fact, as Dr. Werner probably suspected, it wasn't the babysitters who were taking poor care of Isis, it was Dr. Vas.

The report further confirms Dr. Vas' initial denials that there were any marks on Isis' head when she left on Friday, as well as Dr. Vas' statement that she didn't pursue the bruising on the neck and shoulder on Thursday night because she "did not think it was too much of an issue." *Id.* at 5-6. In addition, the CPS worker makes clear that Dr. Vas refused to cooperate with the investigation:

> Every time the workers attempted to discuss issues with Dr. Veronica Vas, she states she was not emotionally able to handle the information and confrontation. She did hang up on the worker on one occasion. She was informed along with Steve, her fiancée, to contact the worker when she arrived back in town to finish the investigation. She has been back for two weeks and has not followed through with contact with the worker. She has only contacted the worker regarding visitation and this is now handled through Family Support Services. The worker has left messages for contact with Dr. Vas and she has not responded.

Id. at 6.

The CPS conclusions in the Vas investigation were generally consistent with their conclusions in the Lopez investigation. Thus, CPS concluded that:

- The Lopezes provided proper care to their own children;
- The Vas children were exposed to neglectful behaviors in Dr. Vas' home;
- Dr. Vas had not demonstrated consistency in her ability to parent her children;
- Dr. Vas had failed to seek medical help for Isis for her arm or the bruises found prior to her death; and
- There were signs of past abuse and neglect to Dr. Vas' children, and the Lopezes allowed it to continue.

Id. at 8-9; *see also id.* at 8 (suggesting without support that Dr. Vas allowed DeAnn and Ernie to neglect her children).

An "intranet risk assessment report" attached to the investigation is even harder on Dr. Vas. CPS Vas Investigation, Ex. 77 (risk assessment report follows log of contact narratives). Using standardized measuring techniques, it concludes that Dr. Vas presents "extreme" risks in multiple categories, including quality of emotional and physical care, maltreatment pattern, current severity, chronicity, trend, home environment, social climate, response to intervention, attitude and deception. This report specifically found that Dr. Vas was hostile towards CPS and offered implausible explanations, attempted to deliberately mislead CPS and/or refused to disclose important information. *Id.* (Intranet Risk Assessment at 7).

On December 10, 2000, CPS sent Dr. Vas a letter informing her that she had been found responsible for medical neglect of Isis and neglectful supervision of all three children but that CPS would not be offering services to remedy the problem. CPS Vas Investigation, Ex. 77.

b. Family Court Hearings, November 2000. At a family court hearing in November 2000, the Family Court transferred custody to Dr. Shelton and further ordered that any visitation by Dr. Vas be supervised until further order of the Court. *See* Shelton/Vas Custody Proceedings, Ex. 74 at 7 (Temporary Orders; excerpts from Word deposition attached).

c. Provision of Information to District Attorney. Ms. Klaehn, the CPS worker largely responsible for the Lopez and Vas investigations, testified at a 2002 hearing that, as a potential witness in the criminal case relating to Isis' death, she had given the District Attorney all of the information she had regarding Isis' injury and death, *including the structured narratives summarized above*, and that the District Attorney was aware of all facts and opinions in CPS' possession as of December 2000. Ex. 76 at 37, 52. As of December 2000, according to Ms. Klaehn, the District Attorney and CPS were "investigating [Dr. Vas'] dad as being the person that might have been involved in the death." *Id.* at 57. There is no indication in the

available records as to why the District Attorney in fact excluded Dr. Vas and her father from further consideration, particularly given their knowledge that Isis' bruises occurred while in her mother's and grandfather's care.

5. Autopsy Report. As indicated, the autopsy report concluded that Isis' death was due to multiple blunt force injuries. Autopsy Report, Ex. 56. Since Isis' bruises (the most obvious signs of blunt force injuries) occurred while in her mother's and grandfather's care, this report should have excluded Ernie as a likely suspect in the child's death and focused attention on the mother and grandfather. Instead, the State attempted to withhold this report while continuing to cooperate with Dr. Vas. While the autopsy report was received by the District Attorney on March 12, 2001 and reported in the Amarillo newspaper on March 14, the District Attorney would only allow Mr. Isern to read the autopsy report in her office. She would not allow him to take a copy to Ernie, saying that she would not allow him to obtain a copy until a few days before the grand jury. Mr. Isern was therefore forced to file a motion to obtain the report, which should have been provided under the Open Records Act. Ex. 97. The District Attorney produced the report on the day of the hearing. When Dr. Vas met with the police on March 26, the day before the hearing on the provision of the autopsy report, she was not only allowed to read the report but given copies of the photographs developed from her disposable camera, photographs that Ernie's counsel did not receive until a day or two before trial, two years later.

6. Defense Investigative Reports: Pat Chambers (March-April 2001). Since the State appeared to be ignoring all available evidence, including the pre-existing bruising, Ernie's parents paid for a private investigator, Pat Chambers, to investigate the facts surrounding Isis' death. Pat Chambers interviewed DeAnn, Lola Lopez (a nurse at Northwest Texas Hospital),

and the two nannies who cared for Isis, Lorrie Word and Illa Belle Smith. She also reviewed the court files in the Shelton custody suit. Her reports are consistent with the information set forth above. *See* Chambers Reports, Ex. 64.

7. Defense Investigation: Dr. White Report (April 19, 2001). On March 29, 2001, Ernie's attorney asked Ernie's parents for money for medical experts. Ernie's mother, Rosa Lopez, paid $7,000, as requested. Ernie's parents understood that $3,000 was for a review of the medical files by a pathologist in Corpus Christi (later identified as Dr. Lloyd White) and the remaining $4,000 was for other experts. *See* R. Lopez Aff., Ex. 32 at ¶¶ 25, 27, 35 (with attached receipt and transcription from diary).

On April 19, 2001, Dr. Lloyd White, a forensic pathologist and at that time the Medical Examiner in Corpus Christi, Texas, provided a preliminary review of the autopsy report and other materials. Dr. White noted Dr. Vas' irregular lifestyle; the unclear picture of what exactly happened to Isis during the hours, days and weeks prior to her death; the "reports of recent irritability, nausea and fever associated with mysterious injuries around the head, neck and arms (bruises? insect bites?), which were of such severity that Dr. Vas feared being accused of child abuse if she took Isis to the hospital"; the history of aggression by her brother, Alex; and "the absence of circumstantial or physical evidence specifically linking Mr. Lopez to Isis' injuries or which supports a conclusion that only Mr. Lopez could have been responsible for [Isis'] injuries." Since there was no medical or scientific basis for Ms. Gorday's timing of Isis' genital injury to within two hours of hospital admission, Dr. White concluded that, given the complexity of the facts and medical evidence, it was not possible to determine the nature of Isis' injuries, who inflicted them, or when they were inflicted based on the information provided. White Aff., Ex. 1, Att. A. Dr. White's charge for a full medicolegal investigation would have been $2500,

including a limited review of the microscopics. Defense Communications, Ex. 90. Ernie's defense counsel did not, however, retain him or provide him with the medical records that would have been required for this investigation. White Aff., Ex. 1 at ¶ 10 (forensic review would have required complete medical records, comprehensive time line, and recuts from the brain and other organs), ¶ 19 (currently available records incomplete and partly illegible), ¶ 88 (listing information missing from autopsy report). Instead, two years later, Ernie's trial counsel listed him as an expert witness in their pre-trial submissions without requesting a records review or even contacting him until the punishment phase of the trial. White Aff., Ex. 1 at ¶¶ 1-10.

8. <u>Psychological Evaluation of Ernie (April 11, 2001)</u>. At CPS' request, Ernie agreed to take a psychological evaluation. Based on the history, clinical interview and psychological testing, Dr. Edwin Basham reported that Ernie appeared to be a well-functioning (i.e., normal) individual with no major personality disturbance. Lopez Psychological Evaluation, Ex. 70 (Basham report). Apart from a somewhat naïve belief that innocent people are not convicted and tendency to minimize his current legal difficulties, Dr. Basham found that Ernie did not have problems or behavior patterns that fell outside the normal and healthy range of human functioning. Dr. Basham also found that there was no reason to question Ernie's portrayal of himself as an innocent victim caught in an unfortunate situation. Since Ernie had a strong sense of duty and sufficient social support from family and friends to cope with the crises in his life, Dr. Basham did not feel that any external interventions were needed. *Id*. at 6.

9. <u>DeAnn's Grand Jury Testimony (June 6, 2001)</u>. Despite consistent evidence of Ernie's innocence and Dr. Vas' neglect and/or abuse, the District Attorney presented the case against Ernie to a grand jury in June. As previously described, DeAnn's testimony gives an excellent overview of the Vas household as well as Isis' medical symptoms in the days prior to

her death. Because of its importance, DeAnn's grand jury testimony is attached as Ex. 71 and should be treated as part of the trial transcript by the reviewing courts. In her grand jury testimony, DeAnn gave a full description of Isis' symptoms, Dr. Vas' refusal to take Isis for medical care because of the bruises on her chest, and Dr. Vas' dependence on Paxil and inability to keep her stories straight. Her testimony is consistent with the Kleinpeter parenting evaluation and the affidavits of Lorrie Word, Dena Ammons, Brandi Roberts, Ashley Looney, Dr. Shelton and Dr. Hampton. DeAnn also reported that Ernie did not drink at all or have a drug problem (GJ at 175), had normal sexual interests (GJ at 179), was not attracted to Dr. Vas (GJ at 176), and had never shown any interest in pornography, x-rated movies or sexually touching children (GJ at 179-180).

By the end of DeAnn's testimony, the State should most certainly have been fully aware – if they were not already aware – that Isis was seriously ill in the days prior to her death, that Dr. Vas was neglectful, that Isis' bruises occurred while she was in her mother and/or grandfather's care, and that Ernie was a good caretaker with no psychological abnormalities. Many of these facts were confirmed, moreover, by a parade of people – Dr. Shelton, Ms. Word, Tommy Lopez and others – who called or appeared, unsolicited, at the police station or District Attorney's office to volunteer information on these points. Although this type of information is critical to any investigation of a child fatality or child abuse, the State not only ignored this information but berated those who presented it and obtained an order in limine prohibiting Ernie's attorneys from introducing it at trial. *See, e.g.,* Word Aff., Ex. 22 at ¶¶ 54-56 (describing District Attorney's pounding on desk and refusal to consider any information provided); Shelton Aff., Ex. 20 at ¶¶ 34-39 (District Attorney's refusal to conduct proper medical review or consider information on Dr. Vas' or her father's inappropriate care of children). Such actions violated the

established investigative protocols as well as the prosecutors' constitutional obligation to seek justice, not convictions. *Berger v. U.S.,* 295 U.S. 78 (1935).

10. Police Review of Forensic Evidence (June 8 – September 2001). Two days after DeAnn's grand jury testimony, the police re-activated the investigation, looking for the first time at the physical evidence, including the sexual assault examination kit, Ernie's clothing, and a short fall off the couch the previous night.

a. Serology Review. On June 13, Sgt. Burgess asked the Southwest Institute of Forensic Science to examine the debris collection labeled "dried secretions from Isis Vas" for pubic hair. Police Reports, Ex. 63 at 26. The results were negative. Police Reports, Ex. 63 at 27; RR 6:55 (Burgess) (no foreign hair, pubic hair or semen from rape exam kit).

b. DNA Analysis. On June 13, Sgt. Burgess sent three of Isis' diapers and the clothes that Ernie had been wearing when he was arrested (Speedo shorts, briefs and a t-shirt) to the Bexar County Criminal Laboratory in San Antonio, where criminalist Garon Foster examined the diapers for the presence of semen and hair and the clothing for the presence of blood. Police Reports, Ex. 63 at 26. These results were also negative**.** On June 18, Mr. Foster indicated that there was no indication of semen on the diapers and no sign of blood on the clothing. *Id.* at 27. There was a chemical indication of the possible presence of blood on one of the diapers (consistent with Ernie's description of rust-colored spots on the morning diaper), and some cellular material was identified microscopically on the underwear. *Id.* At trial, Mr. Foster indicated that the cellular material was epithelial or skin cells and that there was no blood, semen or other stains on the underwear or other clothing. RR 6:80, 87, 94.

On June 28, DeAnn and Ernie voluntarily gave blood samples for DNA testing. The three samples from the front panel of Ernie's underwear, on which the skin cells had been found,

showed: cutting 1, strong DNA from unknown male (not Ernie or Alex); cutting 2, DNA from Ernie Lopez and Isis Vas (very faint, requiring several rounds of testing, and barely above call level); and cutting 3, DNA from Ernie Lopez. Police Reports, Ex. 63 at 29-30; *see also* RR 5:115-118. As Erin Reat, the criminalist who conducted the testing, testified at trial, all of the DNA findings were consistent with transfer and/or childcare. RR 5:147-148.

c. Examination of Sofa and Car Seat. On July 18, at the direction of the District Attorney's office, Cpl. Rickwartz went to Ernie's home to pick up a car seat from DeAnn. He also went to Mary Guerrero's home to photograph the couch and loveseat from Ernie and DeAnn's home, with and without a ruler. Police Reports, Ex. 63 at 28. The records do not indicate what the District Attorney did with this information. However, as Dr. Sunderland states in his affidavit, a fall from this height might well cause the bleeding noted at autopsy in a child with deranged coagulation. Sunderland Aff., Ex. 4 at ¶ 13.

11. Indictments (October 3, 2001). Despite the fact that all of the physical and psychological evidence collected over the year supported Ernie's innocence, Ernie was indicted for aggravated sexual assault and capital murder on October 3, 2001. Despite the fact that the autopsy had found that the cause of death was "multiple blunt force injuries," consistent with the pre-existing bruising, the indictment on the capital murder case charged "shaking" and "causing one or more impacts to the head" on or about October 28, 2000. Ex. 80.

12. Campos Reports (February – April 2002). In January 2002, Mr. Isern hired Ted Campos, a private investigator and former member of the Special Crimes Unit, to investigate the charges in the sexual assault and capital murder cases. Mr. Campos prepared several reports, each of which confirmed Dr. Vas' negligence and Ernie's innocence. Mr. Campos found, for example, that the two people who had daily contact with Dr. Vas during her pregnancy with Isis

– Dena Ammons, her nurse, and Lorrie Word, her nanny –noted similar changes in Dr. Vas' behavior, leading them to independently conclude that Dr. Vas had become mentally unstable, without no noticeable improvement after Isis' birth. *See* Campos Reports, Ex. 65 at 11. Mr. Campos was not able to obtain any information on Charles Vas, who remained somewhat of an enigma. *See id.* at 8, 11-12.

Mr. Campos also conducted a full investigation of Ernie, canvassing the neighbors on his block. The information on Ernie was also completely consistent: everyone who knew Ernie – from a 16 year old who had known Ernie all his life to a 79 year old who had known Ernie for nearly thirty years to the mother of his oldest daughter -- described Ernie as very good with his kids, never yelling or losing his temper, kind, and hardworking. Even as a young man, he had never been in trouble with drugs or fighting. *See id.* at 13-14.

As noted earlier, Mr. Campos also noticed some oddities in the State's investigation. Specifically, the file was much smaller than he expected in a homicide investigation, and the photographs were in black and white, making it impossible to determine the color of the bruises. The District Attorney maintained, moreover, that this was all they had – a position that seemed unlikely since Special Crimes had always taken color photos of crime scenes, not black and white. *See id.* at 1. Mr. Campos also noted that Judge Dysart recounted that Dr. Vas had gone to see him shortly after Isis' death, acting "real weird" and wanting him to say that Ernie was responsible for Isis' death, leaving Judge Dysart with a lot of questions as to who had committed the murder. Mr. Lightsey, the AMS supervisor who later testified at trial, told Mr. Campos that Ernie and his father were "talking in Spanish and acting suspicious" when he arrived on the scene – an observation that is contrary to the reports of the other AMS and AFD personnel and quite unlikely, since Ernie does not speak Spanish.

Mr. Campos did not complete his investigation, partly because he lacked funds and partly because he was not asked to do so. A proper investigation would have included a trip to Indiana to investigate Charles Vas, Dr. Vas' father, as well as a thorough evaluation of all medical records, many of which are not yet available. By the time of trial, Mr. Campos was extremely concerned that Ernie's defense counsel had not yet obtained an expert review of the sexual assault photographs. Since this was critical, Mr. Campos obtained the name of Debbie Jenkins, a former sexual assault nurse examiner, now a pediatric nursing professor at Collin County Community College in McKinney, Texas, and sent her the sexual assault photographs. Ms. Jenkins confirmed that there was trauma in the vaginal area but raised the possibility of other causes, ranging from inflammation to bleeding disorders. *See* Ex. 82 (Isern notes of conversation with Ms. Jenkins, suggesting that possibilities include a deranged clotting mechanism, viral diarrhea or gastroenteritis, sitting in urine or feces, and/or severe diaper rash, all of which are supported by the medical record); Ex. 7 (Draft Affidavit). However, the Court denied Mr. Wilson's request for a late designation of Ms. Jenkins as an expert witness, indicating that they could use her as a consulting expert (for which the Court would presumably pay) and suggesting that the issue could be revisited if defense counsel decided that they absolutely had to have her testify. RR 3:16-22.

13. <u>Family Support Service Visitations (April 2002-April 2003)</u>. From April 2002 to April 2003, the Court required that Ernie's visits with his children be supervised at Family Support Services. The reports of the supervisor, Florence Martin, M.A., are contained in Ex. 68. In her reports, Ms. Martin describes Ernie as a warm, loving and capable parent who consistently met his children's physical and emotional needs. *See, e.g.,* Family Support Services Records, Ex. 68 at 5 (children very happy to see Ernie, who played actively with all of them; helped

children pick up and put their shoes and socks back on, brushing off the sand; when time to say good-bye, children all cried and wanted to go with him; Ernie cried too but did his best to console them), 8 (Ernie tells stories of things he remembered them doing when they were smaller), 14 (Ernie rocking Cody, who was sleepy), 17 (Ernie's attentiveness to all three children, Nikki and Cody always sad and often cry when Ernie has to leave; Ernie cries too but explains that he is working on trying to see them more and tells them how much he misses them), 18 (Ernie paying individual attention to each child, developing rituals, soothing them when he has to leave; obvious that Ernie and the children care deeply about each other), 19 (compassionate handling of accident on playground), 22-23 (Cody wants more time to Ernie by himself; Ernie gives extra attention and explains how he has to divide his time, making Cody feel better).

On October 1, 2002, just prior to a court hearing, Ms. Martin summarized her experiences with Ernie and his family:

> Ernie handles every situation very appropriately. He is a very involved father. He plays actively with each of his children . . . He cleans them up when they get dirty from playing or eating . . . If they ever argue with each other about anything, which has been very seldom, he very appropriately corrects them . . . usually by talking with them and explaining to them that they need to share, to be nice to each other, etc., etc. . . When they accidentally fall down and cry, he holds them and comforts them and talks gently to them. Ernie seems to have very good parenting skills and is very fond of his children, as they are of him. He always asks the children to help him clean up the toys, etc., when it is time to go. He also always cleans up the children . . . washing their faces and hands, feet, etc, putting on their shoes, and getting them ready to go home.

Family Support Services Records, Ex. 68(a) (Letter from Ms. Martin to Mr. Isern, October 1, 2002). After his conviction, Ms. Martin wrote to Ernie in prison:

> I hope that you will continue to keep your faith and not give up, Ernie. I hope also that your family will continue to pursue legal action to assist you. Without exception, you always came across to me and all the counselors who worked with you and your children at Family Support Services, as being an exceptional father .

> . . Your love and concern for your children always showed very clearly. . . There was never one bit of phoniness to you . . . you were always totally sincere in what you did and said, and that always shined [through] too . . . Your children also have much love for you, Ernie . . . that was completely obvious as well . . . and your wife, children, parents, and brothers I am sure are heartbroken by this outcome. . .

Id. (Letter from Florence A. Martin, MA, Counselor, Family Support Services to Ernest Lopez).

14. <u>Alex Shelton Outcries</u>. While the Lopez children continued to do well, Vas' oldest son, Alex, continued to struggle. In October 2002, after attending Dr. Vas' wedding to Dr. Gertsler, Alex became unusually aggressive. At school, he stabbed a classmate with a pencil. At home, he killed the family dog, reportedly breaking its neck by throwing it against the wall, and attempted to smother his sister, Emily, with a pillow. Although Alex had previously been seeing a psychiatrist on a sporadic basis, Dr. Shelton took Alex to Bobbi Allen, a play therapist at Leta Acker Associates.

On December 4, Ms. Acker told CPS that Alex had made strong statements about his grandfather, Charles Vas. Specifically, Alex said:

> He won't leave me alone, said gross things to me, stuck his tongue on my face, touched me on the butt. He would touch me and put his hands on my body. I'm scared of him. He would lay on top of me (I was still sleeping, I didn't have breakfast [when asked when this occurred]). . . Grandpa, I want him to stay in Michigan forever, I don't want him to come here.

CPS Shelton Investigation, Ex. 73(d). After the Christmas visitation, Ms. Allen also reported that Emily had disclosed that Dr. Gerstler also hit Alex on the head and/or butt. *Id.*

These allegations were investigated in Texas and Michigan. At the Court hearing on the Shelton children in December 2002, CPS recommended that Dr. Vas' visitations with the children be supervised given CPS' past experience with Dr. Vas "not making appropriate choices or protection of her children." Shelton/Vas Custody Proceedings, Ex. 76 at 35 (Klaehn, Statement of Facts). On February 12, 2003, CPS told Dr. Shelton that there was sufficient

information to determine that abuse/neglect did occur. CPS Shelton Investigation, Ex. 73(c) (Letter from Katrina D. Klaehn to Douglas Shelton, Feb. 12, 2003). An administrative review of the investigative findings requested by Mr. Vas was postponed at the request of the District Attorney's office pending completion of Ernie's criminal trial. CPS Shelton Investigation, Ex. 73(e) (findings of administrative review). At trial, the District Attorney objected to the introduction of any evidence on Alex' allegations and the Court agreed, with Ernie's defense counsel's seeming concurrence, saying that the outcries were "too remote and unrelated" to be relevant to the alleged sexual assault of Isis, which occurred two years previously. RR 7:21. In fact, this evidence was directly relevant since, if Isis had been sexually assaulted, the most obvious suspect was Mr. Vas, who was caring for Isis when the bruises appeared.

The review of Alex's allegations was completed in November 2003. Since Alex refused to discuss the incident with his grandfather when interviewed at The Bridge and there were no other complaints against Mr. Vas, the reviewer found that there was not a preponderance of the evidence indicating that Charles Vas had sexually abused Alex. However, the reviewer noted that Alex' pediatrician was concerned that Alex may have been exposed to pornography and that Alex' behavior and statements to the therapist prevented the reviewer from ruling out that abuse had occurred. CPS Shelton Investigation, Ex. 73(e) (findings of administrative review).

15. **Experts**. Of all the deficiencies in the investigation, the most striking is Ernie's defense counsel's failure to obtain medical experts. Despite Dr. White's preliminary report, Ernie's defense counsel did not retain Dr. White or subpoena the medical records necessary to conduct a full investigation. White Aff., Ex. 1 at ¶¶ 3-10. They did not, moreover, obtain the sexual assault report or photographs until a few days before trial, and they did not attempt to obtain an expert review of these photographs until the trial was underway.

The failure to obtain the complete medical records and an independent review of those records is inexplicable given that Ernie's parents had paid $7,000 for a review by Dr. White and others. Defense counsel was, moreover, well aware that this review was critical to Ernie's defense. In January 2003, Ernie's defense counsel contacted a DNA expert, Dr. Elizabeth Johnson, who told them that they needed to hire a forensic pathologist and made a personal recommendation. Ex. 103. Instead of doing so, defense counsel filed a motion for the appointment of Dr. Johnson, stating: "Ernest Lopez requests that the Court appoint Dr. Elizabeth Johnson as an expert in the area of nature and circumstances of injuries to the child the subject of said indictments, as an expert witness in this matter." *Id.* (Defendant's Ex Parte Motion for the Appointment of an Expert, ¶ 6). Dr. Johnson is not, however, an expert in the nature and circumstances of injuries to a child; indeed, she is not a medical doctor. Instead, as she pointed out, the defense needed a forensic pathologist, such as Dr. White, to determine the nature and circumstances of the child's injury and death. *See* Johnson Aff., Ex. 6 at ¶ 1.

16. <u>Veracity of Vas</u>. By the time of trial, it would have been impossible for anyone with any familiarity with Dr. Vas or the case not to realize that Dr. Vas was untruthful. *Cf., e.g.,* Police Reports, Ex. 63 at 22, and Shelton/Vas Custody Dispute, Ex. 66 (Vas denies presence of facial marks) *with* Police Reports, Ex. 63 at 14, 16 (Vas admits presence of marks to police officer but refuses to sign affidavit on advice of criminal defense counsel) and RR 7:8 (Vas reluctantly admits presence of "bumps" before arrival at Lopez home).

There is also ample evidence that Dr. Vas lied routinely, particularly to her babysitters and Dr. Shelton. *See, e.g.,* Shelton Aff., Ex. 20 at ¶ 12 (Vas asked him to take children despite fact his father was dying because she needed to study) *with* Pediatrics Records, Ex. 57 at 7, 9 (Vas leaving to spend weekend in Las Vegas); Word Aff., Ex. 22 at ¶ 19 (Vas often not where

she said she would be. We have also provided a transcript of tape recorded conversations between Dr. Vas and Dr. Shelton in which Dr. Vas mislead Dr. Shelton not only about her own whereabouts for the two weekends in October in which she was visiting Dr. Gertsler but on the whereabouts of the children. Vas and Shelton Phone Tapes, Ex. 75 (transcript of tapes; tapes also available for Court review). As these tapes suggest, Dr. Vas tells so many tales that she cannot keep them straight. For example, after telling Dr. Shelton that she had gone to San Antonio on the weekend of the 20th to pick up the keys for her house, Dr. Vas clearly cannot remember what she has told him:

Shelton: And did you, did you get your keys?

Vas: What do you mean?

Shelton: From San Antonio.

Vas: No.

Shelton: You didn't go?

Vas: Not yet.

Shelton: I thought you were going Thursday.

Vas: Well, we were, but my Dad got sick. He had a fever.

Shelton: Okay.

Id. at 16-17 (Sunday, 12:50 p.m.). In fact, Dr. Vas was in Michigan seeing Dr. Gertsler. If Dr. Vas *was* telling the truth that her father had a fever, he would have been a particularly poor choice as a sole caretaker for a small baby.

On Tuesday, October 24, Dr. Vas again told Dr. Shelton that she was going to San Antonio that weekend to close on her house and get the keys, this time taking the children with her:

Shelton: You're leaving tomorrow for what?

Vas: San Antonio.

Shelton: Kay.

Vas: Close on her, get the keys and stuff and then we're planning to move thirty days from today.

. . .

Shelton: So – you're gonna – when will you be back from San Antonio?

Vas: The kids will be here for you to pick up on Wednesday night [Nov. 1] at 6 o'clock.

. . .

Shelton: *And is there a number that I can call to talk to them?*

Vas: ***No.***

Shelton: *Why not?*

Vas: *I don't have a phone number. We are on vacation.*

Shelton: *So, if I wanted to talk to them, there would be no way?*

Vas: *Not this trip.*

Shelton: *K. And are you taking care of the kids while you're gone?*

Vas: *Yep, they're coming with me.*

Shelton: So, is anybody else going?

Vas: Not that I know of.

Shelton: Are you sure?

Vas: None of your business, even if there were.

Shelton: *Well, it's my business when it comes to my kids. It is my business to know who takes care of my kids.*

Vas: *I am taking care of the kids, Doug. Me. Their mother. Okay?*

Shelton: Well –

Vas: *No one else.*

Id. at 19-22 (emphasis added), 25 (Vas repeats that children are safe with her). In fact, Dr. Vas wasn't going to San Antonio; she was going to Michigan to see Dr. Gertsler, and she was leaving the children with the Lopezes. Four days later, CPS called Dr. Shelton to return to get his children since Dr. Vas was in Michigan, Isis was in critical condition at Northwest Texas Hospital, and the children were in CPS custody. *See also* Shelton Aff., Ex. 20 at ¶¶ 21-24.

Dr. Vas repeated her deceits in the courtroom. Thus, in a December 2002 Family Court hearing, Dr .Vas testified:

Emerson: Do you recall telling Doug back then that you were going to San Antonio with your children? (referring to weekend of Oct. 27)

Vas: No, because I had previously looked at that house.

Shelton/Vas Custody Dispute, Ex. 76 (excerpts from December 2002 Hearing at 143). In fact, the tapes make clear that Dr. Vas had indeed told Dr. Shelton that she was going to San Antonio on the weekend of the 27th, just as she had told him that she was going to San Antonio on the weekend of the 20th. On both weekends, however, she was actually going to Michigan to visit Dr. Gertsler.

In the December 2002 hearing, Dr. Vas claimed that she had not been sexually abused as a child and that she had never given such information to CPS. Ex. 76 at 136. Ms. Klaehn testified, however, that Dr. Vas had told her that she had been sexually abused as a child. *Id.* at 53-58. Because of Dr. Vas' history of neglect and concerns about her father, Ms. Klaehn felt that Dr. Vas should be limited to supervised visitations and that Dr. Vas' father should not be permitted any contact with the children. *Id.* at 35, 59.

Dr. Vas was also untruthful in describing the incident in which she left Isis unattended. In the tapes, Dr. Vas claims that she only left Isis alone for 10 minutes:

Shelton: I hate to say it, but it brings up issues in my mind whether or not they have been left by themselves.

Vas: They have never been left alone.

Shelton: Never ever?

Vas: And Isis was left alone for 10 minutes. And I thought I heard another child screaming. Okay? I'm a mother.

Shelton: Well, I'm a father too.

Vas: My baby was perfectly safe.

Shelton: By itself?

Vas: I drove around the block to see if it was a child that was screaming and I came back home.

Shelton: Yah, right.

Vas: That's the truth.

Shelton: So you're saying Lorrie lied.

Vas: As far as the time. I'm not saying that I didn't go around the block. I did. I did. Because I thought I heard a child screaming.

Shelton: From inside your house?

Vas: I was outside.

Ex. 75 at 24-25. In fact, as set forth in the affidavits, Ms. Word was at the house alone with Isis for an hour, during which time she not only cleaned up the baby but called several friends to discuss the situation. Word Aff., Ex. 22 at ¶¶ 31-35; Roberts Aff., Ex. 25 at ¶ 13; Looney Aff., Ex. 26 at ¶ 15. The condition of the child and the bed indicated, moreover, that Isis had been unattended for quite some time, most likely an entire hospital shift. Word. Aff., Ex. 22 at ¶ 50.

The affidavits are replete with instances of Dr. Vas' lack of credibility and insensitivity to others. Indeed, it is virtually impossible to tell when Dr. Vas is telling the truth since her stories change from day to day, depending on the audience and the circumstances. It seems, in short, that the Kleinpeter evaluation was correct when it characterized Dr. Vas as manipulative, self-centered and with a strong tendency to blame others for her own problems. Kleinpeter Report, Ex. 72; *see also* CPS Vas Investigation, Ex. 77 (Intranet Risk Assessment; finding risk of deception to be "extreme").

V. COURT PROCEEDINGS

A. Pre-Trial Proceedings.

Ernie's trial for aggravated sexual assault took place on April 13-16, 2003. The pre-trial proceedings indicate, however, that procedural steps occurring prior to trial jeopardized Ernie's right to a fair trial. Of these, the most important were Ernie's lack of adequate representation; the separation of the sexual assault and capital murder charges; the exclusion of evidence on Dr. Vas' negligent parenting; and an inadequate and misleading voir dire.

1. Inadequate Representation. To represent him, Ernie and his parents originally hired David Isern, a young attorney affiliated with Jeff Blackburn. R. Lopez Aff., Ex. 32 at ¶ 16; Ernie Lopez Aff., Ex. 37 at ¶ 70. It was Ernie and his parents' understanding that Mr. Isern would do the bulk of the work but that Mr. Blackburn would advise and assist him. *Id.*; *see also* R. Lopez Aff., Ex. 32 at ¶¶ 25-27. Later, Mr. Blackburn told Ernie's mother, Rosa, that he and John Mann would handle the case if Ernie were indicted on capital murder charges. *Id.* at ¶ 37. At some point, Mr. Blackburn and Mr. Isern parted ways, and the case went with Mr. Isern. By the time Ernie was indicted – nearly a year after Isis' death – Ernie needed court-appointed counsel since all of the money the family had been able to raise, mostly from his father's

retirement funds, had been used for the experts, bail, attorneys' fees and other expenses relating to the charges. Ernie Lopez Aff., Ex. 37 at ¶ 72.

On November 5, immediately following the indictments, the Court appointed Joe Marr Wilson as counsel on the capital case. Orders Appointing Counsel, Ex. 95. It was the family's understanding that John Mann was second chair, and that David Isern would be assisting. R. Lopez Aff., Ex. 32 at ¶ 48; Orders Appointing Counsel, Ex. 95 (Letter from John Mann to Judge Board). Ernie and his parents understood that Mr. Wilson was also the lead attorney on the sexual assault case, whose facts were inextricably intertwined with the capital murder charges. Ernie Lopez Aff., Ex. 37 at ¶ 72. The Court files indicate, however, that Mr. Wilson was not appointed to the sexual assault case until March 28, 2003, approximately two weeks before the sexual assault trial. Orders Appointing Counsel, Ex. 94. Since Ernie understood that Mr. Wilson and Mr. Isern had been appointed in November 2001, Ernie was puzzled when, in the fall of 2002, Mr. Isern began asking for money for legal fees. Defense Contract/Correspondence, Ex. 91 (letters requesting additional payment dated September and December 2002). When Ernie reminded him that he was court-appointed, Mr. Isern said something like, "oh, that's right. Forget it." Ernie Lopez Aff., Ex. 37 at ¶ 73. The Court records indicate that Mr. Isern was not court-appointed on the sexual assault case until April 17, 2003, midway through the trial, but that he continued to participate in the case in the interim. Orders Appointing Counsel, Ex. 94.

As this suggests, from 2001 through the trial, it was unclear who was representing Ernie, on what cases and on what basis. *See also* Orders Appointing Counsel, Ex. 95 (Letter from John Mann to Judge Board, Feb. 22, 2002, indicating that he had not heard from Mr. Wilson or Mr. Isern on the capital murder case to which he had been appointed several months previously, and that he assumed therefore that he had been relieved of his obligation to represent Mr. Lopez).

What is clear, however, is that regardless of the status of the court appointments, Ernie's counsel did not prepare for the sexual assault trial. At the beginning of the trial, Ernie's counsel had not yet obtained the medical records or contacted experts, with the exception of Elizabeth Johnson, a DNA expert. Midway through the trial, Mr. Wilson indicated that he had not yet even *seen* the sexual assault photographs or the body diagram of the pre-existing bruises, which would mean that he had not seen the sexual assault examination report at all – even though this is what the entire case was about. *See* RR 5:104 (during Ms. Gorday's testimony, Mr. Wilson not sure he'd seen sexual assault examination photographs; asked to see them); RR 7:32 (during presentation of defense, Wilson hadn't yet seen body diagram of bruises). It also appears that Mr. Wilson either did not read or did not understand the import of Dr. White's preliminary review, in which Dr. White advised that it is not medically possible to time injuries in the manner suggested by Ms. Gorday – a critical element since the entire case was about timing. *Cf.* White Aff., Ex. 1, Att. A (no medical or scientific rationale for determining the age of injuries in this manner) *with* RR 8:9 (Mr. Wilson told Court Dr. White's preliminary review not very informative since he did not have enough information at that time). Mr. Wilson also appeared to have little grasp of key facts and no concept of the time line. *See, e.g.,* RR 7:19-21 (Mr. Wilson apparently planned to base defense on Alex Shelton's outcry against his grandfather, mistakenly thinking that this had occurred in October 2000, rather than October 2002). In addition, Mr. Wilson failed to familiarize himself with the literature on sexual assault, which was widely available by 2000, or on shaken baby syndrome, which was available by 2003. *See, e.g.,* Soderstrom Aff., Ex. 2 at ¶¶ 7-17 (reviewing medical literature on sexual assault); White Aff., Ex. 1 at ¶¶ 109-121 (some research undermining key tenets of shaken baby syndrome conducted as early as 1987, with increasing research between 2000 and 2003). This lack of preparation resulted in three

unfavorable pre-trial decisions: separation of the sexual assault and capital murder cases, exclusion of all evidence on Dr. Vas' negligent parenting, and an inadequate voir dire. Together, these decisions – combined with the failure to retain an expert – effectively precluded any prospect of a fair trial.

2. **Separation of Charges**. When the State decided to conduct separate trials on the sexual assault and capital murder charges, Mr. Isern filed a Motion for Continuance, stating that:

> The undersigned counsel is filing said motion based on the fact that the State's position in attempting to try the Aggravated Sexual Assault of a Child case before the Capital Murder case. The State is trying to essentially make a "dry run" on the method of presenting her case on the Capital Murder case. Forcing Defendant to trial on the assault case before the murder case will in effect make the undersigned counsel reveal any potential defenses to the murder case. The undersigned counsel is concerned about the trial jury being made aware of the fact that the child in this matter died. Potential jeopardy issues could also be involved as a result.

Motion for Continuance, Ex. 99 (Jan. 15, 2003). Mr. Isern further stated that defense counsel had not yet found a sexual assault expert – apparently forgetting that after reviewing the sexual assault complaint and autopsy, Dr. White had informed Mr. Isern nearly two years earlier that the sexual assault was inevitably intertwined with the other medical issues and that there was no support for the timing suggested by Ms. Gorday. White Aff., Ex. 1, Att. A.

In a letter dated January 13, 2003, the Court requested briefing on the issue of separating the trials on the two charges. Motion for Continuance, Ex. 99. There is no indication that any briefing was provided. On January 24, the Court scheduled the sexual assault trial for April 14 and the capital murder trial for June 30. So far as we can determine, the Court was never told that the "evidence" of sexual assault was inextricably intertwined with the child's death. Since the human body does not distinguish between bleeding in the genitalia and bleeding in other parts of the body, all bleeding must be considered together in forming a medical or pathological

diagnosis. Since Ernie's counsel had not obtained the medical records or an expert review of these records, the bifurcation of the trial eliminated the most direct evidence of innocence: i.e., the strong likelihood that any bleeding in the genitalia was related to the same factors that caused Isis' death -- infection, earlier injuries (as evidenced by pre-existing bruising), a bleeding disorder and other metabolic abnormalities, combined with dehydration/rapid rehydration and the sexual assault examination itself. The failure to look at the medical evidence *as a whole* further deprived Ernie of a defense at the punishment phase, in which the State introduced medical testimony that Ernie had shaken Isis to death, testimony that is not only contrary to the medical record and literature but inconsistent with the evidence of other, more likely causes.

3. Exclusion of Evidence on Dr. Vas. By the time of trial, CPS, the District Attorney and Ernie's defense counsel all knew that Dr. Vas was a negligent parent who placed her personal life above the needs of her children, that Isis had arrived at the Lopezes covered with bruises that occurred while in her mother and/or grandfather's care, and that Alex had recently accused his grandfather of abusing him. Indeed, by trial, CPS had found that Dr. Vas had negligently supervised all three children and failed to provide appropriate medical care for Isis, and that there was reason to believe that Mr. Vas had abused Alex. CPS Vas Investigation, Ex. 77 (December 2000 letter to Dr. Vas); CPS Shelton Investigation, Ex. 73(c) (February 2003 letters to Douglas Shelton and Charles Vas). Since these findings pointed to Dr. Vas and her father as the direct or indirect cause of Isis' injuries and ultimate death, the State should have re-evaluated its case and provided all information in its possession on these points to Ernie's defense counsel. Instead, the State successfully sought to exclude it. Thus, the State's December 23, 2004 Original Motion in Limine sought to exclude evidence of :

> (1) any **sexual conduct** on the part of **any** State's witness until such time as the Court could determine its admissibility, and

> (2) any mention that . . . **any other hearings,** including . . . **child custody hearings, child protective service determination,** or **any other hearing arising from or encompassing any or all of the facts in this cause, have been held, if they were, and the results or findings of said hearing officers, jury or other fact finders,** unless and until a hearing is held outside the presence of the jury to determine if the relevance of same, if any, outweighs the prejudice to the State.

Ex. 98 at 2, 4 (emphasis in original).[15] While there is no record in the files of the Court or defense counsel indicating the Court's disposition of this or any other pre-trial motion, at the beginning of voir dire, the State stated that this motion had been granted in full and that it included Dr. Vas' sexual proclivities (which suggested a motive), her filthy home (suggesting the likelihood of infection) and Alex's accusations of sexual abuse against his grandfather (who was caring for Isis when the bruises appeared):

> We bring to the Court's attention the Motion in Limine by the state. And in anticipation of what we thought that the defense might do in this case, *based upon the fact situations as we understand it, we believe that they're going to try to bring up matters very remote in time – some very remote – after these events. And to get specific about it, perhaps the sexual proclivities of the mother of the child. Perhaps CPS matters related to the children that followed this event – not preceded it. There is going to be witnesses that we believe the facts will show have absolutely no knowledge of the events of the time frame in which this happened, they could only be talking about something that would be a month or two months in the past – dirty houses, bad motherhood and things like that. The matters that I talk about would apply specifically to perhaps Veronica Vas. The matters that I talk about may – they may attempt to try to apply disparaging things to Charles Vas.* And these matters, in the state's opinion, are remote, they are irrelevant, they are improper under 404(b) and improper as under 403 Rules of Evidence. The problem we have is this. We have a motion in limine [t]he Court has granted in full. . .
>
> Some of the things will be a little more difficult to address if they are within that time frame. If there is such things. *But the things that are remote certainly should not be addressed.* We want to clarify that, and bring that back to the defense attention that that's our – the gist. *And to be specific, that is the gist of our motion in limine as it was granted.*

[15] This suggests that the State was originally intending to use Dr. Vas as a witness. By the time of trial, however, it would have been clear that this would have been disastrous given Dr. Vas' well-established pattern of negligence and deceit.

RR 3:6-8 (emphasis added). Ernie's counsel did not appear to object to this characterization of the State's motion, nor did they attempt to demonstrate that Dr. Vas or her father's negligence may have resulted in the child's death. Thus, in addition to being deprived of his ability to show that, from a medical perspective, the genital findings were secondary to Isis' overall medical condition, Ernie was deprived of his ability to demonstrate that her death and secondary symptoms resulted from negligence and/or abuse by others.

4. Inadequate and Misleading Voir Dire. During voir dire, the bifurcation of the sexual assault and capital murder charges resulted in an inadequate voir dire. In addition, the jurors were given improper directions on reasonable doubt and expert testimony.

a. Inadequacy of Voir Dire. Since the charges against Ernie were bifurcated, it was agreed that during voir dire no mention would be made of the fact that the child was an infant or that she had died. This had several consequences. First, since the jurors were simply told that the case involves "allegations of sexual behavior . . . with someone who is 14 years of age or under," (RR 3:31) some (and possibly most) of the jurors went into trial thinking that they were looking at the statutory rape of a child under 14. They were therefore never questioned on their ability to address impartially the alleged rape of a 6 month old infant – a charge that was accompanied by graphic photographs of the baby's genitalia. *See, e.g.,* Aff. of Michael Gover, Ex. 16 at ¶¶ 2-3 (felt misled when prosecutor told jury in opening argument that case involved rape of a baby; impartiality of jurors should have been addressed since this is very emotional issue). This secrecy continued even though several potential jury members made clear that the age of the child would be a major factor for them. *See, e.g.,* RR 3:166.

Second, since the facts of the case could not be addressed, the potential jurors were not questioned on their knowledge of the case, which had been widely publicized in the Amarillo

newspapers as well as on television. It now appears that at least two of the jurors may have been prejudiced by outside knowledge that they did not disclose during voir dire. Gover Aff., Ex. 16 at ¶¶ 21-22, 25 (clear one juror had made up his mind before trial started; made clear that he knew Ernie was guilty from outside sources); Aff. of David Butler, Ex. 17 at ¶¶ 20-21 (one juror had more information than Mr. Butler did; another juror made an odd comment about Mexicans).

b. Reasonable Doubt Standard. The likely bias of the jury was exacerbated by the State's discussions of the reasonable doubt standard and the deference to be given to experts. On reasonable doubt, the State said:

> In my opinion, humble though it may be, because I have tried a lot of cases and I have dealt with this aspect of the law, *I believe that every one of you,* through life's experiences[,] *make decisions every day of your life on a basis of beyond a reasonable doubt.* Not beyond all doubt and let me give an example.

RR 3:76 (emphasis added). The State then went on to discuss important decisions on which the State felt the witnesses would have made decisions "beyond a reasonable doubt," including medical care for their children or expensive purchases, such as a house. *Id.* When one juror indicated that he did not feel he had made decisions beyond a reasonable doubt, the prosecutor promptly accused him (or her) of not having made "any serious decisions." RR 3:79-80. The equation of the "reasonable doubt" standard with everyday decisions, however serious, dilutes the reasonable doubt standard since most people make even serious decisions, such as buying a house, on a preponderance of the evidence (the civil standard) rather than the far stricter reasonable doubt (or criminal) standard.

c. Deference to Experts. The State further advised the potential jurors that they were to give special deference to experts:

> We have to judge credibility issues . . . The law permits one category of witness to get a leg up or a boost, if you will. They are called expert witnesses. And an expert witness is someone who has specialized knowledge in a specialized field

> that's not generally known to people, okay? Either through training, experience or some sort of an expertise. A doctor, a scientist, a chemist. . . And what the law says is this – would you expect to see experts, perhaps in a trial like this? Of course. There can be nurses, doctors, chemists, if it's DNA it's going to be those types of testings they do . . . There's going to be some doctors or some medical people. Some of them will have specialized training that we generally do not have.
>
> *The law says that you are allowed to give more weight to their testimony in their field of expertise over and against somebody who testifies in the same field but doesn't have their expert credentials. For instance, a doctor talks to you about illness and injury, and then I talk to you about illness and injury. Who can you give the – the leg up to? The doctor. Because that's his area of expertise*. Does that make sense to everybody?
>
> VP: Yes.

RR 3:107-109 (emphasis added). The State then argued that a jury may weigh an expert's testimony only against testimony of another expert. *Id.* Ernie's counsel did not object to this standard (which misstates the law) despite the fact that by then they – and the State – knew that the defense would not be presenting any experts on sexual assault. *See* RR 3:16-20 (defense had "given up" on finding someone to help with evidence on the forensic rape exam; Court denied late designation of Debbie Jenkins, a rape nurse examiner). Despite his lack of experts, Mr. Wilson appeared to endorse the notion that experts could only be contradicted by other experts:

> So – you have got two experts. Doesn't matter what field. But there is something you don't know anything about. And they both get up and just for sake of argument, it never happens this way exactly – but both of them say diametrically opposite things. One of them says "A" the other one says "B." They are both [em]inently qualified. They are both basing their opinion on facts that are undisputed. There is no – you can't find one of them's just taking things and twisting them. They just both came up with different conclusions in this particular field. How do you decide which one you believe?

RR 3:197-198 (suggesting that it's harder to resolve dispute between experts than with regular witness, when jurors can base decision on your normal everyday experience).

B. Trial.

Without defenses or experts, there was little need for a trial. Ernie's defense counsel seemed to feel the same way, for they made no effort to inform the jury that genital findings had numerous causes other than sexual abuse (most of which were present in this case), or that there was no medical or scientific basis for limiting the timing of any injuries to the period during which Ernie cared for the child. Ironically, however, a common sense approach based on the jurors' own knowledge – specifically, their knowledge of the fact that an adult male hand, penis or fist would not fit into an infant's genitalia, at least not without causing substantially more damage than was present in this case; the realization by some jurors that the pre-existing bruises were still unexplained; and their own observations of the mother's demeanor, including her anger at being subpoenaed to testify at the trial of a man who allegedly raped and murdered her daughter – caused 8 of the 12 jurors to believe that Ernie was innocent at the beginning of deliberations. *See* Gover Aff., Ex. 16 at ¶¶ 6, 8, 10 (didn't think penetration physically possible, certainly not in the ways portrayed by the prosecutors; clear that child was covered with bruises caused by mother or grandfather); Butler Aff., Ex. 17 at ¶¶ 8-10 (didn't think child had been penetrated based on photographs; possibly something rubbed on her; struck him as wrong that mother was angry about being subpoenaed). The Court of Appeals also expressed concerns with the child's pre-existing injuries. Ct. App. Op, Ex. 112. Without a medical expert or any effort by defense counsel to explain what this evidence meant, however, neither the jury nor the Court of Appeals felt that they could reject the State's medical evidence. As one of the jurors put it:

> At the end of the sexual assault part of the trial, I thought that Mr. Lopez was innocent. However, the medical evidence said he was guilty. There wasn't any medical evidence to support those who thought he was innocent, and we understood that we were supposed to rule on the evidence, not on what we felt.

Butler Aff., Ex. 17 at ¶ 6; *see also* Gover Aff., Ex. 16 at ¶ 24; Aff. of Linda Russell, Ex. 15. In fact, however, Mr. Butler and seven other jurors understood the evidence *based on their own knowledge of anatomy and psychology*, while the State's medical experts got it wrong.

1. State's Affirmative Case. After opening with a dramatic recitation of the rape of a six month old baby (RR 4:9-13), the State presented the following witnesses.

a. DeAnn Lopez . DeAnn confirmed that she had not seen Isis for approximately 2½ weeks before she came to the Lopezes on Wednesday, October 25. RR 4:34-35, 168. When Isis came to the Lopezes, she had "raised and dark looking spots" on her head, as if the "blood had maybe come to the surface." RR 4:168, 153-154. DeAnn testified that Ernie was concerned about Isis' condition when he came home from work. RR 4:157. Isis' vaginal and anal areas were "red" on Wednesday night, but DeAnn did not see any bruising or open bleeding. RR 4:94. Isis' stool changed from green to black on Wednesday evening and stayed consistently black through Saturday. RR 4:163-164, 177-180.

On Thursday morning, DeAnn, Ernie and Dr. Vas were up with Isis from 3 to 6 a.m. Isis was having trouble breathing, and DeAnn felt that Isis should be taken for medical care. Dr. Vas said she was calling the doctor. RR 4:59. At that time, Isis had a fever, and the Lopezes saw what appeared to be bruises on her chest. RR 158-159. DeAnn didn't take Isis to the Emergency Room or a doctor at that time because Dr. Vas is a doctor. RR 4:161.

From Wednesday to Saturday, Isis drank only about 6 ounces of juice and slept most of the time, even when the phone rang beside her. RR 4:166-167, 170. Her diapers were always messy, not wet, and she cried whenever her diaper was changed. RR 4:167, 170. On Friday night, DeAnn cleaned a "real messy" diaper on Friday evening that had moved into the vaginal area. RR 4:108-110. The prosecutor described this defecation as "massive" and "horrendous."

DeAnn made sure to get the feces out of the vaginal folds since it could otherwise lead to infection. *Id.* (stool always filled diaper; on Friday night, large defecation went up into vaginal area, where she had to clean it); RR 181-183 (constant poop from Wednesday to Saturday; agreed with State that she cleaned large defecation from vaginal area on Friday night). When shown the sexual assault photographs, DeAnn said she could not tell whether the photographs showed trauma since she "didn't spread her out like that" and hadn't looked at these areas in the manner shown in the photographs. RR 4:141-142; RR 4:184-187.

On Saturday morning, Isis was asleep on the floor, and DeAnn understood that she had fallen off the couch during the night. RR 4:171-72. DeAnn confirmed that she did not talk to any medical people at the hospital. RR 4:138.[16]

b. Emergency Personnel. The emergency personnel confirmed Isis' bruising and Ernie's reports of spider bites and congestion. Joe Neely, of the Amarillo Fire Department, testified that the children who were sitting at the kitchen table appeared to be fine and that there was nothing to indicate that this was "an unsafe situation." RR 5:12. Troy Lightsey, an Amarillo Medical Service supervisor, testified that he saw bruises but could not offer an opinion on their nature, seriousness, origin or age. RR 5:33. Mr. Lightsey also testified that, had there been serious genital injuries, the emergency personnel would have noticed them even in an emergency situation. RR 5:34. Mr. Lightsey disagreed with Dr. Vas' diagnosis of "spider bites," testifying that he did not see any spider bites. RR 5:23-24, 27.

[16] When the Court agreed to the State's request that DeAnn be released from her oath of secrecy before the Grand Jury, the Court ordered the State to provide the transcript to Ernie's trial counsel. Mr. Wilson later told the Court that they had only been able to read the first 80 pages, but were finding a lot of information they had not learned from any other witness. RR 4:188-189. As this suggests, the problem wasn't that the information wasn't available: the problem was that, midway through the trial, Mr. Wilson still hadn't talked to his own witnesses and thus didn't know the facts of the case. *See also* D. Lopez Aff., Ex. 29 at ¶ 44.

c. Melissa Fanelli. Melissa Fanelli, an E.R. nurse with SANE training, testified that she and Becky O'Neal, another E.R. nurse, saw "bright red bleeding" when they attempted to insert a foley, a process that typically takes two people to hold the lips open. RR 5:46. They stopped the procedure immediately "because that suggested the baby had been sexually assaulted." After this, they told the police that "this was now a sexual assault case." RR 5:48. Ms. Fanelli could not see where the active bleeding was coming from (RR 5:49, 54), but confirmed that Photograph 38 was an "accurate" depiction of what she saw. RR 5:54. Ms. Fanelli testified that "anything that passes the female sexual organ nonconsensually is considered sexual assault." RR 5:51. Ms. Fanelli further testified that she could determine medically that the bleeding had been caused by "forceful penetration" and that there is no medical condition that can cause such "injuries." RR 5:55. According to Ms. Fanelli, these "injuries" would have caused a great deal of pain, with screaming and crying for a long period of time (more than 15 minutes), possibly requiring IV pain medicine. RR 5:55-57. According to the chart, Ms. Fanelli first saw the bleeding at 12:15. RR 5:57.

Despite the fact that most of Ms. Fanelli's testimony was contrary to the SANE protocols and medical literature, Ernie's trial counsel used his cross-examination to endorse her expertise and conclusions:

Wilson: Ma'am, you are not a pediatrician, are you?

Fanelli: No, sir.

Wilson: But you are trained to look for these type of things and you are trained to recognize these injuries, correct?

Fanelli: Yes, sir.

Wilson: More so than probably anybody else in this room, I would imagine, correct?

Fanelli: Yes, sir.

. . .

Wilson: And so there's – other than doctors, I mean, there's seven other people at least at your hospital . . . that are trained at this, so it's not something most of us . . . But that's not – most of us can't draw an expert opinion about these things, is that correct?

Fanelli: Correct.

RR 5:58. Just as he had not conducted a voir dire to limit her testimony, Mr. Wilson did not question her on the literature (which lists numerous other causes of vaginal bleeding and/or trauma) or cross-examine her on the obvious factual errors in her testimony. Since these are discussed elsewhere, we simply note here that:

- bleeding and/or lacerations on the posterior fourchette are nonspecific findings with numerous causes, including diaper rash, bleeding disorders and the sexual assault examination itself (all present here);
- the SANE Protocols, with which Ms. Fanelli should have been familiar, indicate that the *only* definitive findings of abuse are the presence of sperm (not present here);
- the violent sexual assault described by Ms. Fanelli would inevitably cause substantial bleeding and damage to the inner thighs, outer lips and hymen (none of which were present here);
- Ms. Fanelli's definition of sexual assault as "anything that passes the female sexual organ" ignores the fact that the posterior fourchette is relatively exposed in infants and that good hygiene requires removal of stool from this area, which was done the prior evening by both DeAnn and Ernie;
- Ms. Fanelli's description of summoning Ms. Gorday and obtaining approval for a sexual assault examination after 12:15 is incorrect if the exam was authorized at 12:03, as appears to be the case;

- Ms. Fanelli could not have seen the "injuries" in Photograph 38 since this was the eighth in a series of photographs taken during an extended sexual assault examination in the Pediatric ICU, not the emergency room; and
- Ms. Fanelli was not medically qualified to diagnose the cause of bleeding on the posterior fourchette in an infant who had an acute bleeding disorder, was in cardiac arrest, and had already been subjected to nearly an hour and a half of efforts to resuscitate, including extended CPR and massive rehydration.

d. Becky O'Neal. Ms. O'Neal, a second E.R. nurse with SANE training, gave testimony very similar to Ms. Fanelli's. Ms. O'Neal testified that she did not see any bleeding prior to spreading the labia majora (or outer lips of the genitalia), that she stopped her efforts to insert the catheter when she saw the fresh blood since "[t]o see fresh blood trickling out of a 6 month old was very significant to me," and that she saw "some trauma to her posterior fourchette," which meant to her that "some kind of forceful penetration has taken place." RR 5:67-68. Ms. O'Neal testified that the insertion of a foley would not damage a "normal" child of small size. RR 5:69. Ms. O'Neal testified that it "would have taken a lot of force to cause that type of injury" (RR 5:69), and that one would expect "almost unconsolable crying from such injuries." RR 5:71. Like Ms. Fanelli, Ms. O'Neal testified that Photograph 38 accurately reflected what she saw when she "opened her a little wider." RR 5:75. Ms. O'Neal also confirmed that the attempt to insert the foley occurred at 12:15. RR 5:76 (attempted to insert foley about 45 minutes after hospital admission). Like Ms. Fanelli's testimony, Ms. O'Neal's testimony is contrary to the medical literature and SANE protocols. It is also factually incorrect since the sexual assault exam appears to have been approved at 12:03, before the attempted insertion of the foley, and Ms. O'Neal, like Ms. Fanelli, could not have seen the "injuries" in

Photograph 38, which was taken midway through an extensive sexual assault examination in the Pediatric ICU.[17] Like Ernie's defense counsel, Ms. O'Neal seemed unaware that at the time of the attempted insertion of the foley as well as the sexual assault examination, Isis was not a normal child but instead had an out-of-control bleeding disorder, among other things.

e. Michelle Gorday. Michelle Gorday testified that she was the nurse in charge of the emergency room and the SANE nurse on duty when Isis came to the hospital. She was also the direct supervisor of Ms. Fanelli and Ms. O'Neal in their capacities as E.R. and SANE nurses. RR 5:80-81, 83, 86. Ms. Gorday confirmed that Ms. O'Neal called her into the room after noting some trauma when she was attempting to insert the foley, and that Ms. Gorday immediately instructed the nurses, "don't mess with that area down there, don't put in the foley. . . that area is hands off." RR 5:96-97. Ms. Gorday then told a police officer to get Chuck Slaughter on the phone to approve the sexual assault exam. RR 5:96-97. After Ms. Gorday did the "initial work" in the emergency room, she followed the child to the Pediatric ICU to "take pictures, collect specimens and stuff." RR 5:99. Ms. Gorday took her camera because she knew "it was pretty extensive and severe injuries" and wanted to get photodocumentation. *Id.* It took Ms. Gorday about an hour and a half to do the examination. RR 5:100.

When the State began to show the sexual assault examination photos, Ernie's defense counsel said he was not sure he had seen the pictures and would like to take a look. RR 5:104. After a sidebar discussion, virtually all of the photographs were admitted into evidence and shown to the jury on a 4' by 6' screen. RR 5:115; State Appellate Brief, Ex. 111 at 11. In ruling on relevancy and prejudice, the Court did not look at the pictures but said instead that he would "trust the witness' assessment." RR 5:112. In describing the pictures, Ms. Gorday first

[17] As described previously, if Ms. O'Neal did see the area shown in Photograph 38, this would mean that the photographs were taken during a second sexual assault examination, not the first, and that they should have been excluded from evidence.

identified liquid stool and some blood clotting in the vaginal area. RR 5:119, 122. In pictures 31-33, after "flipping" up the hymen, which she described as bruised and red, Ms. Gorday identified what she described as a laceration on the posterior fourchette, created by force. RR 5:126. As she continued to move the hymen, she identified additional blood. By Photograph 36, she was again "flipping the hymen out of the way" to look at the posterior fourchette, this time using a Q-tip. RR5:127. In Photograph 38, she was "repositioning body parts," a process that she testified would not be painful, by again pulling down the labia majora. RR 5:130. By Photographs 39-40, Ms. Gorday was testifying that the area looked like "hamburger meat," that there was a laceration with a "white look," like raw skin immediately after a shaving cut, and that the laceration took "the entire opening." RR 5:131-134. In Photograph 41, Ms. Gorday was again flipping up the hymen, this time describing the area of the posterior fourchette as "wide and hamburger meat looking." RR 5:136. In Photographs 47-49, Ms. Gorday described the anal area as bruised and discolored. RR 5:141-145.

Ms. Gorday testified that she cannot determine what penetrated a female organ – a finger, a pencil, a pen or a penis – but that she can gauge the force used by whether the injuries are moderate, mild or severe. RR 5:84-85. Ms. Gorday testified that in her 20 years of experience, these were "the worst injuries" she had ever seen, in children or adults. RR 5:156. Ms. Gorday testified that to create such injuries, "you would have to use sandpaper and put your finger up in her vaginal entroitus area." RR 5:160. Ms. Gorday testified that such injuries would cause severe pain, that the infant presumably "carried on," and that such injuries had to be "intentional." RR 5:162-164. She also testified that no injury can be caused by a sexual assault examination. RR 5:102.

Ms. Gorday initially testified that, based on the clotting and active bleeding, the injuries had occurred "within 30 minutes, no more than an hour, easy" of when she saw Isis in the emergency room. RR 5:160; RR 5:167 (injuries very fresh, probably within 30 minutes). Since Ms. Gorday first saw the bleeding at 12:15 p.m., this would place the "injuries" sometime between 11:15 a.m. and 12:15 p.m., and most likely between 11:45 a.m. and 12:15 p.m., i.e., the period in which Isis was under medical care. As a practical matter, this would indicate that the "injuries" were artifactual, caused by some combination of CPR, rehydration, the attempted insertion of the foley and the sexual assault examination, whether in the emergency room or Pediatric ICU, combined with the documented bleeding disorder.

As discussed in more detail below, the rest of Ms. Gorday's testimony is contrary to the medical literature. Like Ms. O'Neal and Ms. Fanelli, Ms. Gorday did not understand that in infants, the posterior fourchette is a relatively exposed and unprotected area (discussed below). Nor was Ms. Gorday qualified to diagnose the origin of bleeding in an infant with a documented bleeding disorder and a clinical history of diaper rash and black sticky stool, which is typically caused by bleeding from the upper gastrointestinal tract. Ms. Gorday's testimony that bleeding or lacerations on the posterior fourchette can only be caused by severe force was incorrect: the medical literature lists literally dozens of possible causes, many of which are present here. The literature also makes clear that the posterior fourchette is very friable (i.e., prone to bleeding) and that bleeding can be caused even by an ordinary medical examination or gentle sexual assault examination. Ms. Gorday's sexual assault examination was not, moreover, properly conducted: no sexual assault protocol suggests using Q-tips to flip the hymen.

On cross-examination, Ms. Gorday agreed that some factors can affect healing, such as a platelet disorder, aspirin, diabetes, hemophilia or a factor 8 problem. RR 5:167. She also agreed

that it is not unusual for fecal material to get up in the genital area, and that it is important to remove it since it could cause infection or blood poisoning. RR 5:171-172. While Ms. Gorday didn't see any signs of infection, she also admitted that she "didn't know anything about [the infant's] medical past, or medical history." RR 5:172. This should have precluded her from testifying on the cause of Isis' genital injuries for Isis' pediatric records showed a longstanding diaper rash; her clinical history indicated that she had been seriously ill for days, if not months; her lab results showed infection, a serious bleeding disorder and liver dysfunction; and both DeAnn and Ernie had removed black stool from her vaginal area. At the hospital, moreover, she had been subjected to numerous medical procedures, including extended CPR, massive rehydration and an aborted attempt to insert a foley, in which the nurses claim to have opened the child up sufficiently to observe her hymen. Any or all of these factors would explain the split-pea size drop of blood shown in the initial sexual assault photographs. *See* Soderstrom Aff., Ex 2 at ¶¶ 5, 30-34; White Aff., Ex. 1 at ¶¶ 71-74; Sunderland Aff., Ex. 4 at ¶ 12.

f. Police Testimony. Officer Taylor described Ernie as cooperative and concerned about the child. RR 5:205, 208. He also testified that Ernie reported that Isis had marks around her face, neck and chest that Dr. Vas said were spider bites; that she had problems breathing and was being given breathing treatments; that she hadn't been eating well; that her stool was sticky and rank; and that he felt sorry for her because, even after cleaning her out, she still had some feces inside her. Officer Taylor testified that he relayed this information to the medical personnel. RR 5:196, 199-200. He also confirmed that Ms. Gorday told him that the sexual assault examination showed "moderate" damage to the vaginal area and "minor" damage to the rectum. RR 5:210.

Office Fewell testified that he put all of Ernie's clothing in the same sack before taking it to the evidence room. RR 5:218.

Detective Moore testified that he wrote out Ernie's statement because Ernie was too upset to write, sometimes crying during the statement. RR 5:236, 244. Detective Moore omitted Ernie's statements about the spider bites, breathing treatments and fall off the couch because he "didn't think they had any bearing to the case" and felt that Ernie was giving "defensive" medical reasons to explain the baby's problems. RR 5:242, 244. Detective Moore maintained this position at trial even though, by then, Dr. Vas had confirmed the spider bites and breathing treatments and DeAnn had also reported the fall off the couch. Detective Moore seemed particularly concerned that Ernie had cleaned the child's vaginal area so as to remove stool from between the lips, seemingly failing to understand that Isis had had several bowel movements extending into this area that had to be removed to prevent infection. RR 5:249-250; *see also* RR 5: 120-122 (Gorday) (pictures 32 and 33 showed stool that had entered the vaginal area).

Sgt. Burgess testified that he photographed the child's injuries at the hospital and that he went to the house to obtain items that would help confirm whether a sexual assault took place, including diapers and medications. RR 6:16-23. He testified that Ms. Gorday told him that the vaginal trauma was "moderate to severe" and that the anal trauma was "minor or minimal." RR 6:51. Sgt. Burgess later removed Ernie's clothing from the large bag in which it had been placed by Officer Fewell and placed it into three smaller bags, which he sent to San Antonio for analysis. RR 6:35-36. The laboratory reports from the rape exam kit were negative, with no findings of foreign hair, pubic hair or semen. RR 6:55. Sgt. Burgess also described the Lopezes as cooperative and said that he "absolutely" did not have to get a warrant to obtain blood samples from them. RR 6:56.

g. DNA Analysis. Garon Foster and Erin Reat testified on the DNA analysis. Mr. Foster identified a small reddish-brown blood stain on the diaper (consistent with Ernie's description of finding spots on the diaper that morning) and some skin cells on the front of Ernie's underwear. Mr. Reat testified that a DNA analysis of three cuttings from this area of the underwear showed: cutting 1, heavy DNA from an unidentified male (possibly one of the police officers who handled it); cutting 2, moderate DNA from Ernie; and cutting 3, very light DNA from Isis and Ernie, consistent with transfer or ordinary childcare. RR 6:109, 117-118. To give some sense of the minimal amount of the child's DNA found on the clothing, the DNA on the first cutting was more than ten times stronger than Isis' DNA. RR 6:143-144 (identification of child's DNA required repetitive runs to meet call criteria). Mr. Reat agreed that when identity is not an issue or in situations involving transference, the DNA numbers "don't mean a whole lot." RR 6:146. Mr. Reat said that transference happens all the time and that he "wouldn't be surprised to find some DNA on an individual who's been caring for a child." RR 6:137, 147 (can be transferred through urine, feces, mucous, etc.). As this suggests, the DNA evidence in this case merely confirms that Ernie was a caretaker who did what he said he did: changed diapers, applied diaper rash medication, gave CPR, and cleared the child's airways of mucous and phlegm when she stopped breathing.

h. Dr. Eric Levy. Dr. Levy, a pediatric critical care physician, testified on sexual assault, timing, dehydration and cleaning of infant genitalia. His testimony on sexual assault was inconsistent with the literature, and he appeared to lack understanding of infant genitalia. In contrast, his testimony on timing and dehydration was quite likely correct.

(i) Sexual assault. Dr. Levy testified that he did not attend the sexual assault examination and did not observe the genital and vaginal trauma until "after the nurse examiner's

process had been performed." RR 6:165. Based on the sexual assault photographs, he agreed with the SANE nurses that the genital, perianal and rectal areas had been traumatized, but he could not tell what had inflicted the injuries. RR 6:166. Dr. Levy testified that he considered any destruction of tissue, such as a tear, rip, bruising or bleeding "to be of a serious, and obvious in my mind, violent nature." RR 6:169-170. This testimony is contrary to the medical literature on child sexual assault, which makes clear that tears, bruising and bleeding can be caused by numerous medical conditions, as well as by the sexual assault examination itself. Dr. Levy also testified that the sexual assault photographs showed no signs of injury or damage on the outer genitalia:

> As in any injury of that nature [dropping on an object], we would first see injury on the outside. Where they come together. *And when I look at those photographs, there is no – I do not see any bruising, redness, distortion, scrapes, abrasions of anything. When you let them come back together, they look normal. They are stained. But the skin, the tissue architecture, the way it looks is normal. And you can't bypass that and traumatize on the inside. It is not possible.*

RR 6:182-183. Despite the lack of external injury, Dr. Levy essentially repeated the nurses' testimony that the child must have been sexually assaulted, causing "inconsolable crying." RR 6:170-187. Dr. Levy further testified that Isis' vaginal vault "broke very similarly to what a woman goes through when she has childbirth, and the head of the baby comes down, and she breaks posteriorally." RR 6:185-186. In fact, the pictures show an intact hymen, with no injuries to the vagina (which is the area behind the hymen). *See* Soderstrom Aff., Ex. 2 at ¶ 21.

(ii) Timing. Dr. Levy testified that, based on the sexual assault photographs, he thought the injury was "very recent – much closer to in the minutes to hour range than anything else," indeed, "closer to minutes to hour, rather than ongoing hours." RR 6:174. Since the sexual assault photographs were taken in the Pediatric ICU between 12:25 and 1:30 p.m., this would place the "injury" somewhere between 11:25 a.m. and 1:20 p.m., i.e., while the child was in the

care of medical personnel. When alerted to this problem, Dr. Levy testified that he knew that the "injuries did not occur in the hospital" because "we saw them on presentation." RR 6:175. However, Ms. Fanelli, Ms. O'Neal and Ms. Gorday testified that they did not see these "injuries" until 12:15 p.m., or 1¼ hours after the emergency personnel began treatment.

Since Dr. Levy's efforts to place the "injuries" in the period that Ernie was caring for the child were unsuccessful, Dr. Levy ultimately testified, with some hints from the prosecution, that he always timed injuries "from the clock going back to time zero, which is the time of presentation to the institution." RR 6:175. This makes little sense, however, if Dr. Levy was timing the injuries based on the photographs, as he testified. In any event, since Isis arrived at the institution at 11:30 a.m., even this revised estimate would place the "injuries" sometime between 10:30 and 11:30 a.m., with the most likely period of injury between 11:00 and 11:30 a.m., when the child was in the care of the paramedics, again suggesting that the genital bleeding was caused by medical procedures, not by sexual abuse.

(iii) Dehydration. Although he did not seem to realize its significance, Dr. Levy's testimony on dehydration was correct:

> State: A hypothetical. If a six month old does not eat well, takes approximately six fluid ounces, liquid ounces over a three day period, and most of that is juice, averaging a couple of ounces a day, what – what's the child going to act like after twelve hours of not having anything but a couple of ounces?
>
> Levy: They're gong to be . . . listless, unresponsive. They're going to be dry. They're going to be obviously, obviously dehydrated.
>
> State: What happens if that condition continues for four hours (days)?
>
> Levy: Great probability at that rate they're going to be close to – they're going to be very ill. And possibly close to death.
>
> State: From what?

Levy: They're dehydrating.

State: Add into that frequent black, tarrish stools. What is that doing to that condition?

Levy: It's exacerbating it. It's making it worse. Because they are losing fluid with those stools.

State: If that continues for 48 – two days – 48 hours?

Levy: They're going to be in the ER.

State: What about for three days?

Levy: Probably won't make it to the ER.

RR 6:189-190. And that is, of course, precisely what happened: after taking only 4 to 6 ounces of fluid over 2½ days, Isis did not quite make it to the emergency room. *See* White Aff., Ex. 1 at ¶ 126 (Dr. Levy's testimony on dehydration essentially correct; unclear why Dr. Levy diagnosed sexual abuse and shaken baby syndrome rather than dehydration); Sunderland Aff., Ex. 4 at ¶ 8 (lab reports confirm dehydration); Squier Aff., Ex. 3 at ¶ 55 (child's death may have been result of natural disease processes, including infection, dehydration and a clotting disorder).

(iv) Bruises. Dr. Levy testified that Isis had small, numerous bruises of "varying ages" and "had been traumatized repeatedly, obviously at different times." RR 6:190. Dr. Levy said this was a "very big signal" that they might be dealing with intentional child abuse, particularly if they got no history or a history that was inconsistent with the injuries. RR 6:191-193. Dr. Levy seemed to suggest that some of Isis' bruises were 72 to 96 hours (or 3-4 days) old, which would place them within the period that Isis was with her mother and grandfather, not the Lopezes. *See* RR 6:192.

(v) Cleaning. Dr. Levy also testified that it is not inappropriate for a caretaker to penetrate the female organ while cleaning:

Wilson: . . . But you are certainly not saying that if you needed to clean a child, that it's inappropriate to have to – to some degree, penetrate their genitalia?

Levy: If one were to see, as an example, stool that has gone into the vaginal vault, certainly one would want to clean it. Doesn't change my previous answer of –

Wilson: I understand. I understand that. I'm just saying that in a general – if we're talking generally, that's not something in and of itself – you would want to – you don't want to hurt the child, obviously. I'm not saying that. But you want to get the feces out too, correct?

Levy: Yes, sir. You want to clean as thoroughly as one can.

RR 6:197. Dr. Levy went on to say:

King: So, even if you have to hold the baby's genitalia, so you might be sure you are cleaning out some feces, you don't go into, in any depth, do you?

Levy: No, ma'am. That's not necessary. You have a layer of curtains which close off that vaginal vault when the architecture, when the tissues are intact. And it closes them off. And again, fluid's going to go down. And so if you have feces or urine, it goes down, not back up. And it will leak out of a diaper, or it will go somewhere else before it reenters the vaginal vault. That's just no – not the way we were designed.

RR 6:198-199; *see also id.* (no reason to clean genitalia of female child to extent it would cause ripping and tearing). Dr. Levy was not, however, familiar with infant genitalia. As discussed below, in infants, as opposed to adults, the posterior fourchette is a relatively exposed area that is subject to the intrusion of feces. It is, therefore, the precise area that may require cleaning by caretakers in order to avoid infection.

2. <u>Defense Case</u>. The State rested on Thursday, April 17, at the close of Dr. Levy's testimony. On Sunday, April 20, Mr. Wilson met briefly with Ernie, telling him that they would now be putting on their case, including their experts. Ernie understood that this included Dr. White. E. Lopez Aff., Ex. 37 ¶ 80. In fact, Mr. Wilson had not yet contacted Dr. White and had

already told the Court that he would not be calling Dr. White at the guilt/innocence phase. RR 3:17 (defense had "given up" on locating a forensic expert to testify on sexual assault). Ernie's family – who had paid $3,000 for a medicolegal evaluation by Dr. White – also expected Dr. White to testify on Monday. *See, e.g.,* Sabian Lopez Aff., Ex. 35 at ¶ 6.

a. Opening Statement. To Ernie's surprise, Mr. Wilson did not talk about the medical evidence or the experts in his opening statement but instead said that the jury would hear from Dr. Vas, Mr. Lopez and Mary Guerrero, DeAnn's sister.[18] He told the jury that:

> [H]opefully we'll be able to keep your attention. We don't plan on spending any more time than we have to. We know you are tired and don't want to spend any more time than you have to on this case, and we hope we can get the evidence to you and you can make a decision and go from there. Hopefully, just one more day we will be able to sum it all up for you, and pay attention to the – the evidence we bring you, just like you have with regard to the State. If you can do that, we'll all be happy with your service in this, and we'll all be respectful of whatever happens in this, but we believe we are going to show you a different perspective you have not heard from the State.

RR 7:4-5. And that was it – Ernie's entire case. No experts, no theory, no medical evidence, and no explanation for Isis' injuries. In his opening statement, in other words, Mr. Wilson offered no defense.

b. Dr. Vas. Dr. Vas testified that she was very angry at being served with a subpoena to testify at trial. RR 7:7. Dr. Vas confirmed that her father had been in Amarillo "for the week prior" to Isis' death and that he watched the children a lot of the time when he was there. RR 7:10. Initially, she denied that there was "anything significant with regard to Isis, physically, that someone would notice looking at her" when she took her to the Lopezes on October 25. RR 7:8. Mr. Wilson then pointed out the bumps:

> Wilson: Did she not have some bumps, or some sort of marks around her parts of her head?

[18] He also re-called DeAnn.

Vas: She had about six little bumps on the left side of her forehead, but those were already healing.

Wilson: Were there any other marks that you had noticed, that you couldn't see without her – with her clothes on?

Vas: No.

RR 7:8-9. Later, Dr. Vas said she saw some bruising on Isis on Thursday evening, specifically a thumb size bruise on her upper right chest, but that there were no other bruises. RR 7:13. However, when asked, she admitted that there was a red place on the left side of Isis' neck. Dr. Vas said she asked DeAnn and Ernie about it and that it caused her some concern. RR 7:13-14. Later, Dr. Vas testified that Isis did not "exhibit any problems or injuries" before she took her to the Lopez house on Wednesday and that she did not find any injuries or anything of that nature that may have occurred subsequently "outside of the bumps I have already mentioned." RR 7:18.

She said that she and the Lopezes had gotten up with Isis on Thursday night/Friday morning, rather than Wednesday night/Thursday morning, and she didn't recall any conversations about calling the pediatrician. RR 7:10-11, 13. When Mr. Wilson asked for her professional evaluation of Isis' problems as of Friday morning, Dr. Vas replied that Isis "had a cold." RR 7:12. When Mr. Wilson attempted to explore the nature of Isis' cold, the Court upheld the State's objection, stating that he would sustain the objection until "she demonstrates she is a hostile witness." Dr. Vas then described Isis' energy level as "quite normal," saying that Isis did eat, but admitted that she was mostly at the Lopezes at night, when Isis was sleeping. RR 7:17.

The testimony makes clear that Mr. Wilson had counted on using Dr. Vas to introduce evidence that Alex had accused his grandfather of sexual abuse. However, because Mr. Wilson

had the dates wrong, this line of questioning was excluded. RR 7:18-21 (Alex' outcry related to events occurring in October 2002, not October 2000, as Mr. Wilson apparently believed). Since Mr. Wilson appeared to have prepared no other defense and seemed unfamiliar with the facts – including the pre-existing bruising, Dr. Vas' constantly shifting stories to the police and CPS, and Dr. Vas' approval of antibiotics (which would be inappropriate for a "cold") – he did not question Dr. Vas further. *See* Police Reports, Ex. 63 at 14.

c. DeAnn Lopez. DeAnn confirmed that it was Wednesday night/Thursday morning (not Thursday night/Friday morning) that Isis had woken up feverish and in distress. RR 7:24. Pointing to the bruises on Isis' chest, Dr. Vas said at that time that she did not want to take Isis to the emergency room "because she didn't want anybody to think she was abusing her." RR 7:24-26. DeAnn confirmed that Isis slept a lot and was listless from the time she arrived at their home on Wednesday. RR 7:27.

On cross-examination, DeAnn confirmed that she had not seen any vaginal or rectal injuries on Isis from Wednesday through Friday, when Dr. Vas left. RR 7:28. Interestingly, the State appeared to agree that Isis' chest bruises were present on Wednesday night, and DeAnn confirmed that she had talked to Dr. Vas about them on Wednesday night. RR 7:29-30. These bruises were near Isis' underarms on both sides, and there was also a bruise on her back. RR 7:30. The bumps on Isis' head were on the left side, going "back into the hairline." RR 7:30-31.

Mr. Murphy showed DeAnn a diagram used at the grand jury on which DeAnn had marked Isis' pre-existing injuries in red. RR 7:31-32. When Mr. Wilson asked why he wasn't given a copy of the diagram with the grand jury testimony, Mr. Baskett said that the diagram had been in the District Attorney's file. RR 7:32-33. Mr. Wilson replied that he didn't recall seeing it. *Id.* Since Ms. King said that the diagram was drawn by Michelle Gorday, this is presumably

the diagram included in the sexual assault report that shows all of Isis' bruises as "brown" or brownish. Body diagram, Ex. 52; Sexual Assault Examination Report, Ex. 54. *As this shows, even at this point in the trial, Mr. Wilson had not reviewed the sexual assault report, which showed that Isis was covered in brown bruises when she arrived at the hospital.* Mr. Wilson therefore objected to the introduction of the diagram – the single piece of evidence that is most damning to Dr. Vas and the State, for the bruises shown on this diagram could not possibly have been caused by Ernie. RR 7:33 (Court sustains objection; precludes introduction of diagram since it contains hearsay). DeAnn confirmed that, at the grand jury, she had marked numerous bruises and marks that were present when Isis arrived at their home. RR 7:33-36 (identifying marks on chest, tip of nose, forehead, back of head, and corner of eye).

d. Ernie Lopez. Ernie testified that DeAnn and he kept Dr. Vas' children three or four times a week, up to two or three days at a time. RR 7:44. He liked the Vas children, but at times "it seemed like we were raising her children instead of her." RR 7:42-44. Ernie was upset when he saw the bumps on Isis' head on Wednesday:

> Ernie: When I came home Wednesday, she was crying and she was laying on her belly and I picked her up and I turned her around and I said, oh, my God, you know, what happened to this child?
>
> Wilson: What did you see?
>
> Ernie: I saw bumps on her head – her – around her neck.

RR 7:46. Ernie described getting up Wednesday night/Thursday morning with Isis, who wouldn't eat or calm down, as well as Dr. Vas' attempted phone call to Isis' pediatrician. RR 7:48-49 (Vas said she could not remember the number).[19] They gave Isis medicine, but Dr. Vas didn't want to take her to the doctor:

[19] When Ernie called Dr. Vas on Saturday morning to get Isis' pediatrician's telephone number, however, Dr. Vas promptly gave him the number. RR 7:77.

Wilson: What did she indicate about taking the child to the doctor?

Ernie: She – she had the – the baby up to her ear, listening to her breathe. *And she said that . . . she didn't want to take her in, because she didn't . . . want anybody to think that she was abusing her children.*

RR 7:50 (emphasis added). Ernie described Isis' left eye as bloodshot and her stool as "black and marbleized" and "really thick and sticky." RR 7:51-53. He confirmed that Isis cried when her diaper was changed from Wednesday to Saturday. RR 7:53-54.

On Friday night, Ernie slept in the living room. During the night, he woke up when Isis cried after apparently rolling off the sofa, and he put her back to sleep on the floor beside Sienna and himself. RR 7:57. At around 7 a.m., he gave Isis her scheduled breathing treatment, putting Isis on his lap. *Id.;* RR 7:147. He also changed Isis' dirty diaper and gave her a decongestant sometime in the early morning. RR 7:121-122.

When DeAnn left, Ernie made the older children breakfast and had them watch cartoons. RR 7:58. He tried to feed Isis and put her in the swing, but she wouldn't eat. RR 7:59. He decided to give Isis a bath since she was "reeking of milk, from not being able to swallow." RR 7:127-128. He laid her in the crib and took off her nightie and diaper, which was soiled and had "spots" that looked different than feces. RR 7:60, 68; RR 7:149 ("spotted" diaper was second diaper change). Since this diaper wasn't very messy, he washed her off with a diaper and went to the kitchen to check on the older children, leaving her in the crib. RR 7:129.

When Ernie returned in about ten minutes to give Isis her bath, she was limp and discolored. RR 7:61-62, 129. To revive her, Ernie slapped her bottom and face a little, splashed her with water in the bathroom, and shook her, saying, "Isis," trying to get a response. RR 7:64. When he used a sucker or bulb syringe to clear her airways because he thought something might be stuck in her throat, it looked like a mucous-like fluid was coming out. RR 7:78. When

Ernie's efforts to revive Isis were unsuccessful, he called 911 and started chest compressions based on what he had heard and seen. RR 7:65 (no prior training in infant CPR). When the 911 operator told him to put Isis on her side, he heard air coming out of her rectum and may have seen a hemorrhoid-type projection. RR 7:139. Ernie confirmed that, apart from Saturday morning, he had never been alone with Dr. Vas' children. RR 7:78-79.

Ernie testified that Detective Moore wrote out Ernie's statement because Ernie was upset and didn't have his contacts. In so doing, Detective Moore omitted much of the information that Ernie provided. RR 7:73-74; RR 7:141-143. In particular, Detective Moore "didn't want to know about any of the events from Wednesday to [Saturday];" indeed, he did not even want to go back in time "as far as when they got up in the morning." RR 7:75, 148-149. Ernie consented to a search of his home and voluntarily gave a blood sample for DNA comparison. RR 7:75-76.

On cross-examination, Ernie testified that he had probably changed Isis' diapers three or four times from Wednesday to Sunday. RR 7:91. Each time, she had been "poopy," and there had been one or two particularly large bowel movements. RR 7:93. When he changed the first "poopy" diaper on Saturday morning, there was fecal matter in the vaginal area, which he cleaned with a "wipey."[20] RR 7:94-95. He cleaned in the vaginal area with his fingers because the stool was "black and tarred" and "really sticking to her." RR 7:95. He did not see any injuries to her vaginal or anal areas, but did not grab or expose her in the manner shown in the sexual assault photographs. RR 7:97-98. He also put diaper medicine on her with his finger. *Id.*

Ernie described the "bumps" or "insect bites" that he saw on Isis on Wednesday as "pussy" and "black." RR 7:99. The State appeared to believe these were infected insect bites.

[20] As in DeAnn's testimony, there is often some confusion on dates when events occurred in the middle of the night. In this case, Ernie changed this diaper at about 3 a.m. on Saturday morning.

RR 7:100 (State describes insect bites becoming pussy and infected and suggests that they were up in the "head area;" Ernie agrees). Ernie confirmed that he spent Thursday evening with his daughter Nikki at his parents' house (RR 7:110) and that he had stayed home at noon on Friday to help DeAnn with the children, after which he took a nap (RR 7:117-118).

Unlike CPS, the State seemed to agree that it was appropriate for Ernie and DeAnn to rely on Dr. Vas' judgment in caring for Isis since Dr. Vas was a doctor:

> Ernie: Dr. Vas said it was congestion. So we listened to her. We took her advice. Because I – ain't anybody to question a doctor.
>
> State: I agree with you.

RR 7:111. Ernie confirmed that Emily also had a fever and that Dr. Vas always slept on the floor when she was at their house. RR 7:113. Ernie said there was never any episode in which Isis "let out a blood curdling scream, and was in extreme pain, and cried uncontrollably, and that just went on and on – something that just focused your attention to a – to a rather traumatic single event." RR 7:145.

e. Mary Guerrero. DeAnn's sister, Mary, testified that when she helped DeAnn clean Dr. Vas' house on Thursday, Isis had "things on her head" and what "looked like [a] fading bruise on her chest." RR 7:155. Isis "didn't feel good" when they got to the house, and Mary asked DeAnn if she could give Isis Tylenol. RR 7:152-153. Isis was "real fussy" and "irritable" at first, but later went to sleep. RR 7:153. Since Isis cried and stiffened when Mary changed her diaper, Mary didn't clean her as well as she might otherwise have done since she didn't want to upset her any more than she had to. RR 7:154-156. When Mary testified that Isis didn't have folds or "baby rolls," the prosecutor became angry, presumably because this did not comport with the State's theory that Isis was healthy until 40 minutes before the 911 call. *See* M. Guerrero Aff., Ex. 30 at ¶ 21 (Mary intimidated and surprised at Ms. King's anger since it

seemed obvious that Isis was small and quite thin for a baby). In fact, Ms. King already knew that Isis was "thin" and had fallen off the weight chart since DeAnn, the State's lead witness, had made this clear in her grand jury testimony (GJ 66-67); the problem was that Isis' frailty and weight loss was inconsistent with Ms. King's theory that Isis had been a normal, healthy baby until forty minutes before her death. Mary didn't see any tears or bleeding but said that Isis had "poop up in the front" because it was "kind of a runny diaper." RR 7:161-162. She said that she had not taken her finger, forefinger or thumbs and pulled the child's labia apart or looked into her vaginal vault, as shown in the sexual assault photographs. RR 7:162. The Court sustained Mr. Wilson's objection to Ms. King's attempt to ask Mary whether she would agree that she would have seen tears in the genital area without a magnifying glass. *Id.*

f. Court Charges. Before the closing arguments, Mr. Wilson asked the Court to add the following instruction to the proposed jury charges:

> It is a defense to the prosecution of aggravated sexual assault that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus or sexual organ of the [defendant]. Accordingly, if you find beyond a reasonable doubt that Ernest Lopez II, did then and there intentionally or knowingly cause the penetration of the female sexual organ of Isis Charm Vas, a child who was then and there younger than 14 years of age, by an object unknown to the grand jurors, but you have a reasonable doubt as to whether or not the conduct consisted of medical care for the child, and if such conduct did not include any contact between the anus or sexual organ of the child and the mouth, anus or sexual organ of the defendant, then you shall acquit the defendant and say by your verdict not guilty.

RR 7:166. The State objected to this instruction, stating:

> Judge, I believe that's more of a defensive nature. There is not – I don't believe there's been any evidence in this case that there was a medical treatment of that particular area other than normal diaper change and so I think it is more of a defense as to what his criminal intent was and would not be entitled to a defensive instruction. Certainly not that.

RR 7:166-167. Mr. Wilson responded as follows:

> We have explained, off the record, our concerns to the Court that in this type of case, technically speaking, the cleaning of a child would be aggravated sexual assault. There is evidence in this case by virtue of much testimony and – and more specifically, Mr. Lopez's testimony that he did clean the child, that he did not cause the trauma of the child or intend to cause the trauma to the child. There is no other mechanism in the law to allow a defense, other than the defense of medical – of medical treatment. And I—I told the Court, I'm unaware of whether that covers that. But there is nothing else there. I don't believe it is the intent of the law that a person could be prosecuted if, in fact, a jury found they were simply cleaning a child. So, that is the reason we ask for that.

RR 7:167. The Court denied Mr. Wilson's request for a medical care instruction, stating:

> And – and while I agree that the statute might be worded better, I don't find that that particular defense is supported by any evidence. And so I'll deny that request.

RR 7:167-168. As discussed below, the medical care defense is written into the statute since, without it, every parent who cleans stool or treats a diaper rash in the area of the posterior fourchette – a relatively exposed area in an infant – would be automatically guilty of aggravated sexual assault and could be sentenced to up to 99 years in prison. In this case, there was ample evidence to support a medical care defense since the State's medical experts agreed that cleaning stool from the vaginal area was necessary to prevent infection, and it was undisputed that both DeAnn and Ernie had cleaned stool from this area prior to hospital admission. RR 6:197-198 (Levy); RR 5:171-172 (Gorday); RR 4:108-110 (DeAnn); RR 7:94-96, 98 (Ernie).[21]

Having denied a medical care defense, the Court charged the jury that it must find Ernie guilty if he intentionally or knowingly penetrated Isis' female sexual organ. Jury Charge (Guilt/Innocence), Ex. 105. It was hardly necessary to hold a trial on this point since DeAnn and Ernie had already testified that they cleaned stool from this area on Friday night and Saturday morning. RR 4:109 (DeAnn) (cleaned massive defecation that had moved into vaginal area);

[21] The other possible way to avoid inappropriate sexual assault convictions is to assume that caretakers have the child's (or the child's guardians) implied consent for appropriate cleaning.

RR 7:95 (Ernie) (State was taking position that Ernie had to remove black sticky stool from vaginal area on Saturday morning with fingers; Ernie agreed).

3. State's Closing Argument: Murphy. In its closing argument, the State relied upon (1) Ms. Gorday's characterization of Isis' genital injuries as "recent, virtual[ly] immediate injury" and "pretty strong injury – tearing, and bleeding and extensive bruising," and (2) what the State viewed as the "key to the whole thing," i.e., that nobody saw any genital trauma from Wednesday to Saturday morning:

> *It is impossible to believe that no one saw the trauma that you saw in those photographs. It is impossible to believe that nobody saw blood.* It is impossible to believe that no one saw the extensive bruising around the anus up through the perineum – which is the little piece of skin – the blue – the blue bruising there – and, if you'll reason, one of the pictures – the second picture of the vaginal area – the nurses had barely put pressure and barely spread the labia and there was a very pronounced blued bruised piece of flesh that protruded. You didn't have to do hardly anything to be seeing some issue – some situation that if you had cared for children, you know isn't normal.

RR 7:174-175 (emphasis added). This is an obvious distortion of the testimony since the State's experts testified – and the photographs show – that Isis' vaginal area was completely normal from the outside and that the "injuries" were seen only during a sexual assault examination, which required specialized training in "pulling traction" and (apparently) flipping the hymen with a Q-tip. *See, e.g.,* RR 5:74 (Fanelli) (nothing of concern before opening labia majora); RR 6:182-183 (Levy) (outer genitalia completely normal). Ms. Fanelli also testified that the "protruding flesh" identified by the prosecutor was the clitoral hood, and was of normal appearance. RR 5:74.

The State also misstated the DNA evidence:

> All those little – even the DNA – even the DNA – that DNA – you know, I don't know what to tell you about it. Oh, they found it. It was there. Inside the fly of his pants. That's all I know. Under the circumstances – you know, you can say what you want to about it. That is the worst piece of luck you could ever hope to

> have if they find aggravated sexual assault or sexual assault on this baby while it's in your care and you happen to be there and then they find – that's coincidences running out the – the roof.

RR 8:176. In fact, the State's witnesses had testified that they only found skin cells on Ernie's underwear and that the child's DNA was very weak, consistent with transference and/or ordinary childcare. Since the police originally kept all of Ernie's clothing in the same bag, it is also possible that the child's bodily fluids – which would have been transferred to Ernie as he cared for the child and attempted to resuscitate her – would have been transferred between the clothing items in the bag.

The State glossed over the obvious timing problems for the "injuries":

> The testimony is clear. Dr. Levy, nurse Gorday – the injuries you saw could not have been – could not have occurred – they said recent. They said at the outside, they really thought it was going to be within a 30 minutes to two hour period, as I recall the testimony.

RR 7:177. In fact, Dr. Levy and Ms. Gorday testified that the injuries were so recent that, if one creates a time line, they occurred within the time period in which Isis was being treated by medical personnel.

The prosecutor then went on to state his personal opinion on the evidence, a practice that is barred by Texas law:

> I don't think it's beyond a reasonable doubt. *I think it's beyond any doubt.* There's nobody else but Ernie Lopez. If not him, who? And the answer is – no one. Because no one else was there. No one else could have done that.

RR 7:177 (emphasis added). In fact, in the time period identified by the State's experts, the child was being subjected to intense medical procedures by many people, including CPR, rehydration and the sexual assault examination itself, and any of these procedures could have caused the minor bleeding in the posterior fourchette shown in the sexual assault photographs, particularly given the documented bleeding disorder.

4. Defense Closing Argument. In his closing argument, Mr. Wilson argued that all that the State had proven was that there were some injuries to the child and that Ernie was one of three adults who had been around the child in the several days prior to her death. RR 7:178. Mr. Wilson then argued that Michelle Gorday had a bias, albeit a "noble bias" (RR 7:179), and that her testimony "was to some extent manipulated to fit the theory of the case." He pointed out that her statements to the police officers, in which she described the injuries as "moderate" to "minor or minimal" was inconsistent with her testimony that this was "the worst case [she'd] ever seen." RR 7:182-183. Mr. Wilson also talked about the shifts in Ms. Gorday's testimony on the timing of the injuries and the fact that her initial estimate of "thirty minutes" fell within the period that Isis was in the emergency room. RR 7:183. He said that the photographs were "very painful to look at" and that nobody 'like[d] looking at them," but that they were magnified, that Ms. Gorday didn't know how many times she had magnified them, and that no one knew what they would look like in "real size." RR 7:180-181.

Mr. Wilson pointed out that Dr. Levy did not look at the "injuries" until after Ms. Gorday had finished the sexual assault examination and that:

> If you look at the chronology of the pictures, the farther into the sexual assault examination you go, the more damage the sexual assault nurse is doing. There is very little bleeding at first. Then the more she pries around and looks and sticks things in there and all that, by the last photos you have this pooling of blood that didn't exist in the first photos.

RR 7:184. Mr. Wilson also argued that while no one saw trauma to the child in the days prior to admission, no one (other than the nurses) had "[stuck] their fingers in there and [pried] the poor baby apart." RR 7:184-185.

Mr. Wilson also pointed out problems with the State's characterization of the DNA evidence:

> Let's talk a little bit about the DNA. One thing Mr. Murphy said that I don't know if it is correct – but you can view the evidence and make your decision – he said the DNA sample that they took – first of all, you remember there were no visible anything. This was microscopic. The sample they took was from the inside of the fly. Well, I don't recall that [Erin] Reat – that is what he said. I recall [Erin] Reat saying we clip a part of the – of the fly and put it in the test tube. Didn't say inside outside whatever. We put it there, washed the DNA out of it and run. Somewhere on that sample is where it is.
>
> If he did it with something else with his hand or wouldn't it be on his pants or on his shirt? They don't have any evidence of any of that tested. If he sexually assaulted the child with his hand or with some other part of his body, wouldn't there be his DNA on the child? No evidence of that because there wasn't any. Wasn't any evidence of semen. Wasn't any evidence of DNA saliva. Wasn't any evidence of any skin cells on that child from Mr. Lopez. Why wasn't it there? If this is something that has occurred like they said it was?

RR 7:185-187. Without such evidence, Mr. Wilson said that they are simply "wanting you to convict him because he was in the house when they say these injuries had to occur." RR 7:188. Finally, Mr. Wilson pointed out that there was no evidence that Ernie was a bad person, that he abused his kids or anyone else's kids, or had done anything other than be a dad, a husband, a son, and that their whole argument "doesn't make sense." *Id.*

There is nothing wrong, of course, with Mr. Wilson's arguments. The problem is that without a medical expert or sufficient knowledge of the literature to establish through the State's experts that the genital findings were nonspecific and could have numerous causes, ranging from diaper rash to hospital procedures to sepsis, they were only arguments, not evidence. Without evidence, there was nothing to support Mr. Wilson's argument that the State's experts, who testified repeatedly that the genital findings could only be caused by sexual assault occurring within some short period prior to hospital admission, were simply wrong. To present evidence, Mr. Wilson would have to obtain the medical records, retain an expert and/or familiarize himself sufficiently with the literature to force the State's experts to acknowledge that these were nonspecific findings with numerous possible causes, many of which were present here.

5. State's Closing Argument: King. In her closing argument, Ms. King increased the rhetoric. Despite the Court's earlier admonition to use the term "sexual assault," Ms. King repeatedly referred to the "rape" of a six month old child. RR 7:189-190; *see* RR 6:167-168 (prosecutor claims rape is a legal term; Wilson says it is not contained in the Penal Code and is used to inflame the jury; Court agrees that Ms. King should restrict herself to term contained in statute, which is sexual assault). In referring to the "unknown object" used to penetrate Isis, Ms. King said:

> Perhaps it was his penis. Perhaps it was his hand. Perhaps it was some other – perhaps it was his fists, who knows?

RR 7:191. Given the relative sizes of infant genitalia and the penis, hand or fists of an adult male, this argument certainly was not based on the evidence, particularly since the rape kit did not identify sperm or anything else and even the State's experts agreed that there was no blood or signs of injury on the child's labia majora, or outer lips – as one would expect if a 12-pound infant was sexually assaulted by something as large as a penis, hand or fist. *See, e.g.*, Soderstrom Aff., Ex. 2 at ¶¶ 19, 23 (one would expect to find injuries to inner thighs or outer genital areas in examination that occurred within a few hours of an assault; hard to imagine a type of sexual assault that would cause bleeding portrayed in photographs without injuring the outer genitalia or hymen); Sunderland Aff., Ex. 4 at ¶ 12 (given seriously deranged blood clotting, would expect extensive hemorrhage had sexual assault occurred). Ms. King went on to argue that finding faint DNA on the "inside" of a caretaker's underwear is quite a "coincidence" (RR 7:193) – neglecting to note that it isn't much of a coincidence if the caretaker is male (and would presumably use the bathroom at some point in the morning, likely transferring DNA in the process) or if the caretaker's underwear has been placed in a bag with his other clothing and left there for 7 ½ months prior to DNA analysis. Police Reports, Ex. 63 at 25 (Jones received one

paper sack with Ernie's clothing from evidence room); RR 6:35 (Burgess put clothing from one bag into three separate bags before shipping to laboratory); Police Reports, Ex. 63 at 24 (Burgess sent clothing to laboratory on June 14, 2001).

Ms. King also argued that the pictures were "smaller than a normal size, not larger" – a preposterous statement since Ms. Gorday acknowledged that they were magnified. RR 7:192. Ms. King even suggested that Ernie had time to bathe himself and Isis, thereby getting rid of evidence:

> And why didn't we find DNA on them? What would you do? If you just raped some body? You were in your own home, and nobody's going to come until you call – what are you going to do? You answer that one, too. And when you do, you have your answers.

RR 7:191. Quite apart from the timing problems – there were only 15 minutes between the end of Dr. Vas' phone call and the 911 call – there is no evidence that Isis was bathed at all; to the contrary, when the emergency personnel arrived, she still had feces on her, just as Ernie described. *See, e.g.,* Emergency Reports, Ex. 51 at 6 (Neely, AFD, reported small amount of feces on lower abdomen). Nor was there any evidence that Ernie bathed: no wet towels, a tidy bathroom, no soiled clothes. As this suggests, the State's case was not built on evidence: it was built on rhetoric.

6. Jury Deliberations. Despite the undisputed medical evidence, the jury initially split with 8 for innocence and 4 for guilt. Butler Aff., Ex. 17 at ¶ 4; Jury Poll, Ex. 108. When it looked like it was going to be a hung jury, the jury forewoman asked the Court: "What is the time frame to reach a verdict?" When the Court discussed this with counsel, the State suggested that the answer should be: "Just one word – August" (four months away). Mr. Wilson and Mr. Murphy then agreed that the Court should say, "There is no time limit" and, at Ms. King's suggestion, "please continue deliberations." RR 7:197-198; *see also* Jury Communications, Ex.

107. Apparently, however, the jurors understood this instruction to mean that they could not have a hung jury and were required to reach a unanimous verdict, no matter how long it took. Russell Aff., Ex. 15; Gover Aff., Ex. 16 at ¶ 24. Since some jurors made clear that they would not accept anything other than a guilty verdict, the remaining jurors ultimately decided that, without any medical evidence to support their position, they were required to vote "guilty" whether or not they believed it. *See, e.g.,* Gover Aff., Ex. 16 at ¶¶ 24-29; Butler Aff., Ex. 17 at ¶¶ 10, 19, 22 ; Russell Aff., Ex. 15.

7. Punishment Phase. In the punishment phase, the State announced its intent to prove that Ernie had not only sexually assaulted Isis but had murdered her. Since Ernie's defense counsel had not obtained the medical records or arranged for independent review of these records, this allowed the State to introduce expert medical testimony unimpeded by outside review or evaluation.

a. Dr. Lloyd White. At the beginning of the punishment phase, Mr. Wilson told the Court that the defense had designated Dr. Lloyd White "who had consulted with David a long time ago in this case initially." RR 8:6. According to Mr. Wilson, "we had periodically talked to [him] and he led us to believe he would be available for testimony." *Id.* Since, however, Mr. Wilson did not know with certainty whether the State was going to address the cause of death, "we kind of just let him hang." *Id.* Mr. Wilson said that they had just talked to Mr. White and he was not available. According to Mr. Wilson:

> [Dr. White] apparently is moving to the Amarillo area to do contact pathology work for certain entities in the Panhandle area, apparently including the District Attorney's Office – I don't know. That's what he tells us. He, in his last conversation with Mr. Isern, has expressed a reluctance, if not an outright refusal to try to get here at any time to testify because it will – he is afraid --- harm his – his economic future. . . That is the only person that we have consulted with in regard to our case. He had mentioned potentially this contract situation several months ago and we asked him to certainly let us know if it was going to cause us

> any problems, if we needed him. More specifically for the capital case, but obviously for this case. He had not done so until we found about it.

RR 8:6-7. The Court offered to issue a capias for Dr. White and "drag him up here if that will do any good." *Id*. at 8. The Court also asked Mr. Isern to confirm Mr. Wilson's summary. Mr. Isern's version differed from Mr. Wilson's:

> As Mr. Wilson stated, I contacted Dr. White a moment ago. As Mr. Wilson stated, he is going to move up here to do contract work on some basis with the county, I believe. According to him, expressed a sincere reluctance to get involved and to testify in this case. It's correct that, as Mr. Wilson stated, oh, probably over a year ago, I sent him some information to look at the case. At that time he made no mention of that – you know, probably becoming – moving into this area and doing any contract work, potential conflicts of that nature. Spoke with him about it, and just basically that he expressed his reluctance to testify.

Id. at 8-9. In fact, it had been almost precisely two years since Dr. White conducted his preliminary review of the materials. Since then, Ernie's defense counsel had not obtained the medical records, retained Dr. White, or asked Dr. White to review the records.

When the Court asked if Dr. White had issued any kind of written report that the Court could look at *in camera*, Mr. Wilson advised that:

> He did a long time ago, Judge. It isn't very informative, because he didn't have enough information at that time. You could – it doesn't bother me. It is not very extensive.

RR 8:9. However, Dr. White's report – which Mr. Wilson did not provide to the Court – was very informative since, after reviewing the sexual assault complaint and autopsy, Dr. White had concluded that there was no evidence linking Ernie to Isis' injuries or death and that Ms. Gorday's timing estimate had no basis in science or medicine. White Aff., Ex. 1, Att. A.

When the Court continued to offer to bring Dr. White to Amarillo under subpoena, Mr. Wilson rejected the offer, saying:

> We think it's probably too hard on everybody, our client, his family, the jury to wait until then. We'll just do with it what we – and if later on that looks like

> that's our fault, then the Appellate Court can tell us it's our fault, and we can go from there. We are not confident that Dr. White will agree to show up voluntarily at all. . . And if you know people are adverse to being here, I don't want to put him on the stand doing that. And I don't think he would be very cooperative in dealing with us. If it's going to affect his livelihood, I guess it doesn't do him any good to come up here and help us.

Id. at 10-11. Mr. Wilson said that he had not subpoenaed Dr. White for the previous week out of concern with the expense to the State – neglecting to mention that Ernie's parents had paid $7,000 for experts, including $3,000 for Dr. White, of which the defense had spent only $600. RR 8:12, 14.

The State was upset by Mr. Wilson's approach, which was essentially to go ahead without Dr. White but to leave open a claim of ineffective assistance of counsel for failing to notify their expert of a forthcoming trial. RR 8:12-13. Since the Court was uncomfortable leaving it up to the Court of Appeals, the Court again offered to bring Dr. White to Amarillo under subpoena and asked Mr. Wilson to make a tactical decision on whether he wanted a continuance or whether he wanted to proceed without Dr. White. RR 8:13-14. Mr. Wilson refused to answer the question directly, saying that:

> Now, what I'm telling the Court right now that failure for us to secure at least somebody that would come sit through the testimony – regardless of whose fault it is – and I'll remind the Court that I addressed this issue last week. I addressed it two or three weeks ago what they were going to prove and what they weren't going to prove so we could have our experts ready because it isn't our money. It's the county's money and you are not going to – you don't want them sitting around all week, but you would let us get them here when we knew what it was going to be. This is first time he told us he didn't want to testify. He hasn't told us exactly what his findings can be because he doesn't know what their experts are going to say on that, but I'm telling the Court if that is an issue and if somebody asks me on the stand, I'm going to say we should have done it better.

RR 8:14. The Court initially concluded that "the only thing to do at this point is to give y'all a continuance, and get him up here, and let's see what he has to say." *Id*. at 16. After speaking to

Dr. White on the phone, however, the Court said that Dr. White was willing and able "to confer with y'all on a consulting basis." *Id.* Mr. Wilson agreed, saying that:

> After discussing it with Dr. White and counsel and Mr. Lopez, we feel that that is probably the optimal thing for us. That's what we really need from him the most. That he doesn't feel that he would add much through direct testimony that he can't give us through consulting. And so, we are willing to do that and we will not ask the Court to continue it. We don't believe that that would be the best thing for anybody involved in this, and we are willing to proceed and we apologize about the delay this morning.

RR 8:16-17.

Dr. White's affidavit makes clear, however, that the problem was not that he was not willing to testify or that consulting would suffice; the problem was that he had not been retained or given the medical records that he would have needed to evaluate the medical findings:

> 11. In April 2003, two years after my initial comments, I received a telephone call from the office of one of Mr. Lopez' attorneys. At the time, I did not know that the case was in trial. As a matter of logistics, trial testimony is generally scheduled several months in advance. In this case, testimony on the cause and timing of death would require a thorough review of the medical records as well as an independent assessment of recuts of the brain and other organs.
>
> 12. At the time of this phone call, I understood that Mr. Lopez's attorneys were considering retaining me as a defense expert and wanted me to come to Amarillo on very short notice (perhaps two days), possibly for some kind of hearing. I was not able to do so given scheduling issues. I was also considering working as a medical examiner in the Amarillo area, and was uncertain whether I wanted to take on a case of this nature in that area.
>
> 13. I also spoke with someone, whom I now understand was the trial judge, who asked whether I was willing to be a consulting expert. I assumed from this conversation that the defense had hired another testifying expert but might want some back-up or consulting work from me. I indicated that I was willing to consult, but I did not hear back from Mr. Lopez' trial counsel.
>
> 14. At the time of the phone call, I did not understand that Mr. Lopez had already been convicted of sexual assault, without the benefit of a defense expert or independent medical review. Nor did I understand that the State was about to introduce shaken baby syndrome in the punishment phase of the trial, or that Mr. Lopez still did not have a defense expert.

. . .

> 16. Given the medical and factual complexities of the case, I was surprised to learn that Mr. Lopez had gone to trial without a defense expert. In my view, it would not have been possible for Mr. Lopez to obtain a fair trial on either the sexual assault or murder charges without an independent medical review or qualified defense expert.

White Aff., Ex. 1.

Dr. White has since reviewed the available medical records on a *pro bono* basis. As set forth in his affidavit, Dr. White's conclusion after reviewing these records is that there is "no medical support for a conclusion that Mr. Lopez harmed Isis Vas." *Id.* at ¶ 127. The nurses' testimony that the bleeding in the genital area could only be caused by sexual assault is incorrect: the medical literature makes clear that such bleeding can have a variety of causes, including urinary tract infection, inflammation, diaper rash, rehydration, clotting disorders or even the sexual assault examination itself. *Id.* at ¶ 71. On an infant, moreover, the posterior fourchette is relatively exposed and subject to hygiene needs that are not applicable to older children or adults, increasing the likelihood of infection as well as the need for cleaning. *Id.* at ¶ 72. Dr. White was particularly concerned that there was:

> [N]o evidence in the medical records that any effort was made to look at the child's genital findings in the context of her overall medical condition, including a documented bleeding disorder, diaper rash, urinary tract infection (e coli cultured from the urine), dehydration and rehydration, all of which can, separately or in combination, cause the findings identified as diagnostic of sexual assault at trial.

Id. at ¶ 73; *see also id.* at ¶¶ 74-75 (genital findings may be explained by massive rehydration; faint contusions in anal area do not suggest abuse since they are commonly found in children who have been ill, particularly with diarrhea or difficult bowel movements).

Dr. White also reiterated that the genital and other findings cannot be timed as suggested in testimony of the emergency personnel. *Id.* at ¶¶ 76-79. After looking at the child's hospital records, the laboratory reports and medical history, Dr. White concluded that:

> Given the medical record, I cannot rule out the possibility that the child died of blunt force injuries occurring while she was in her mother's and grandfather's care. However, it is also possible that the child died of natural causes, such as sepsis (infection) or pneumonia, compounded by dehydration and inadequate medical care.

Id. at ¶ 127. Dr. White states in his affidavit that this is the testimony he would have given at trial had he been asked in a timely manner. *Id.* at ¶ 21.

b. State's Case. In the punishment phase, the State introduced testimony by Dr. Levy, the E.R. physician, and Dr. McClain, who conducted the autopsy.

(i) Dr. Levy. Dr. Levy testified that when Isis arrived at the hospital, she had no heartbeat and was in full arrest, which equals death 100% of the time. RR 8:19-20. The E.R. personnel nonetheless tried to "bring her back" to give the mother time to come and say good-bye and to allow a potential organ harvest. RR 8:21.

Dr. Levy testified that he observed "multiple bruising of varying ages," which he viewed as "pathognomonic" (or diagnostic) of child abuse. He said that he could also see bleeding in the retina, which along with the bruises, indicated "shaken baby" or "battered child" syndrome. RR 8:23. Dr. Levy testified that when they were able to do a CT scan, they saw some blood and evidence of a traumatic injury. Taken together, this told him that he was dealing with a traumatic injury and that survivability was nil. *Id.*

In this testimony, Dr. Levy confused shaken baby syndrome, an unproven hypothesis, with "battered child syndrome," a pattern of escalating violence against a child by a parent or

caretaker. RR 8:24. Dr. Levy correctly stated, however, that many of the bruises or injuries were old:

> State: You are suggesting a culmination of different timed trauma?
>
> Levy: I'm not suggesting, I am saying, yes. The bruises that we talked about last week were of varying ages and therefore, she had been repeatedly traumatized.

Id.; *see also* RR 8:25 (x-rays also showed old fracture of clavicle on right side). Dr. Levy also testified that all of the injuries were caused by the same person:

> Levy: In my experience, perpetrators are single – there may be other people in the home who may be aware, but the perpetrator is a single person.
>
> State: Why do you say that?
>
> Levy: In my clinical experience, that's what I've seen is – is – and when we look at the literature, it identifies who the perpetrator and – and lists the perpetrators. And it's typically talked about as the perpetrator. A single person perpetrator.
>
> State: Single person?
>
> Levy: Yes, ma'am.
>
> State: Not single event?
>
> Levy: Single person perpetrator, not single event. Single person.

RR 8:27; RR 8:54 (all injuries caused by one person, including 3-4 week old broken clavicle, older bruises, sexual assault and brain injury). Since at least 22 of Isis' bruises occurred while Isis was in her mother's and/or grandfather's care, this testimony excluded Ernie as the perpetrator.

Dr. Levy nonetheless implied that Ernie was the perpetrator based on Ernie's inability to explain the bruises that occurred before Isis came to the Lopez home:

> State: Can you explain more to us why you – what you base that opinion on? How – how you come to an opinion with what you know about this child

before you complete your – your care for the child as to how you get that down to one person?

Levy: The history that I obtained was from one person – asked about what had happened to Isis. The – the events that led to this. I did not get any history of a serious or violent brain injury. I knew that that's what I was dealing with. And all of the injuries that I saw, I believe, occurred – although at different times – occurred from a single perpetrator.

RR 8:28, 25 (when we get no history of trauma, which was situation in this case, we know that we are dealing with child abuse), 31-32 (95% of our evaluation comes from the history). It is unclear, however, why Dr. Levy expected Ernie to be able to explain injuries that occurred before the child was in his care. Dr. Levy further attempted to inculpate Ernie by dating the "head injury":

State: Can you estimate the time of this head trauma?

Levy: Yes, ma'am.

State: How do you do that?

Levy: The – knowing the physiology and knowing what happens once you shut down the central computer, it occurred very recently prior to the 911 call. We just can't live without our brain.

. . .

State: You have estimated the time of the head trauma to be not far – I don't remember your word – from the time the baby came into the Emergency Room. Can you – can you get it any closer at all? Could it have been within a day?

Levy: No, ma'am.

State: What – what is the time frame?

Levy: My estimate is within the hour prior to the 911 call is when she would have been injured.

State: Is that comparable to the time of the sexual assault?

Levy: Yes, ma'am.

RR 8:40-41. In fact, the medical literature and investigator protocols make clear that it is very difficult to time brain injuries, and that death is often delayed for days, weeks or months after a fatal injury. White Aff., Ex. 1 at ¶¶ 76-78 and 116-117 and literature cited therein; Hueston Aff., Ex. 10(b) at 4 (delayed death common in cases involving head injuries).

Dr. Levy's testimony on "shaking" was also contrary to the literature. Dr. Levy testified that "violent shaking" causes a subdural hemorrhage by rupturing the bridging veins, causing the brain to die, and that it requires great force:

> Levy: We are talking about an extreme violent force. In the literature, the other time we have noticed similar injuries are in fatal motor vehicle crashes, which are extremely violent.
>
> State: Is this comparable to that?
>
> Levy: For that period of time, it approximates that severity of – of force that is applied to – to that area.

RR 8:39; *see also* RR 8:40 (comparing force to fall from second story building). In fact, the biomechanical literature establishes that human beings cannot shake a child with a force sufficient to cause subdural hemorrhages. White Aff., Ex. 1 at ¶ 112 and literature cited therein. In this case, moreover, the autopsy did not show extensive bleeding throughout the subdural space, as hypothesized by Dr. Levy, but instead showed a very small, thin bleed attached to the dura, a type of hemorrhage that is characteristic of a stroke or bleeding from the dural vein, rather than trauma. It can also be caused be rehydration or anything else that interferes with the normal blood flow through the brain. *See* White Aff., Ex. 1 at ¶ 64; Squier Aff., Ex. 3 at ¶¶ 33-34.

Dr. Levy does, however, accurately describe the mechanism of shaking a baby. As Dr. Levy said, to shake a baby, one typically holds them "around the chest" or under the arms. RR 8:52-53. Since Isis had fading bruises on her chest and back in precisely these positions when

she arrived at the Lopezes, it seems clear that, if Isis was shaken, she was shaken by her mother and/or grandfather, not by Ernie.

(ii) Dr. McClain. Dr. McClain, the pathologist who conducted the autopsy, confirmed the autopsy findings, in which she had concluded that Isis died "as a result of blunt force injuries, and the manner of death was homicide." RR 8:67. Dr. McClain testified that the brain and genital hemorrhages could only be timed within a broad range, which she estimated as within 24 hours of death, give or take a few hours. RR 8:64-65. Dr. McClain further testified that bruising and bleeding continue to age until death is pronounced or, presumably, when life support ends. RR 8:63-64. Since Isis was not removed from life support until about 5:30 a.m. on Monday morning, this suggests that the hemorrhages occurred sometime between 2:30 a.m. on Sunday, when Isis was in the Pediatric ICU, and 5:30 a.m. on Monday.

At the same time, however, Dr. McClain linked the hemorrhages to the facial contusions and a large abrasion on the back of Isis' head. This would give a very different time line. Since the contusions were brown at hospital admission, they certainly did not occur within approximately 24 hours of death. Instead, the medical evidence and witness testimony (including, ultimately, Dr. Vas' statements and trial testimony) establish that the facial markings, noted as contusions at autopsy, occurred prior to arrival at the Lopezes, when Isis was in her mother and grandfather's care. The large abrasion on the back of the head was not, however, noted in the sexual assault diagram, indicating that it occurred after Isis was admitted to the Pediatric ICU. This would once again be consistent with post-admission bleeding.

As this suggests, the timing estimates given by the State's experts are not as "cut and dried" as the State suggested. To the contrary, there is a wide range of timing possibilities. Significantly, however, while there is substantial evidence that the contusions arose before

arrival at the Lopez home and that the abrasion and hemorrhages occurred after hospital admission, there is *no* medical evidence suggesting that any of these symptoms occurred while Ernie was caring for Isis.

c. Defense Case. Since Ernie's defense counsel failed to obtain or review Isis' medical records, they did not attempt to rebut or explain the medical evidence. Nor did they call professional evaluators, such as Dr. Basham and Ms. Martin, who had independently concluded, based on their professional observations, that Ernie did not have psychological abnormalities and was an excellent caretaker. Instead, Ernie's defense counsel essentially conceded that Ernie had shaken Isis to death and relied on his friends and family in seeking mercy from the jury.

Ernie's friends and family were not unsophisticated, however, and many of them could see that the evidence did not, in Mr. Wilson's words, "make sense." Thus, they made clear that they did not believe that Ernie was guilty and that they felt that evidence had been withheld from the jury. RR 8:88-90 (testimony of Kelee Evans) (sat through trial but did not agree with jury verdict; felt there were things that were not in the trial that would have made a difference); RR 8:95-97 (Shelley Guerra) (would allow her three year old daughter around Ernie any time and anywhere; believes Ernie wrongfully convicted); RR 8:97-103 (Captain Monty Owens, Amarillo Fire Dept.) (long experience with Ernie and Ernie's children as well as his own children; cannot reconcile in his mind the Ernie Lopez he knew with the conviction; does not believe it); RR 8:105-106 (Brian Wood, Amarillo Fire Dept.) (conviction does not "make sense" because Ernie has "such a big heart," is an excellent father and husband who would give you "the shirt on his back"); RR 8:109-110 (Mark Hanke, Amarillo Fire Dept.) (has seen Ernie with children; Ernie is "180 degrees opposite" to type of person who would commit offense of which he was convicted); RR 8:112-114, 116 (Ernest Lopez Sr.) (Ernie did not give problems as a child; did

not drink or use drugs; very family-oriented; took good care of his wife and children; believed Ernie unjustly convicted because information withheld from jury); RR 8:117-123 (Rosa Lopez, Ernie's mother) (Ernie was Mr. Caprock High School and often elected class favorite; stayed away from drugs and alcohol and was a very good parent; felt that jury hadn't been told the whole truth and that evidence had been hidden or suppressed).

d. Charge on Punishment. In the punishment phase, the Court instructed the jury that if there was testimony on the defendant having committed acts other than the offense alleged in the indictment in this case, they could not consider such other acts unless they first found and believed beyond a reasonable doubt that the defendant had committed such acts. If they did not so believe, or had a reasonable doubt thereof, they should not consider the testimony for any purpose. RR 8:127-128.

e. Closing Arguments. In its closing argument, the State told the jury that they already knew that a sex offender could look like Ernie Lopez. Mr. Murphy also told the jury that "what you didn't know and what we finished off . . . was that [the] baby, Isis Vas – six months old – did not survive the violence. That is what it's about." In fact, the juror affidavits make clear that they had known in the guilt/innocence phase that Isis had died. *See, e.g.,* Gover Aff., Ex. 16 at ¶ 4; Butler Aff., Ex. 17 at ¶ 5; *see also* RR 8:138 (Mr. Wilson did not "for one minute believe that the fact that this little girl didn't survive had escaped you in the prior part of the trial).

Mr. Wilson did not respond by addressing the medical evidence or reminding the jury that Isis' bruising occurred while she was with her mother and/or grandfather, not Ernie, but instead told the jury:

> We simply ask you to not judge Ernst Lopez on the worst part of his life. Judge him on the whole of his life. And when you do, I think that you will find, in your

> heart, some amount of compassion. Some amount of ability to say – to temper justice with mercy.

RR 8:141.

> The State responded with even more rhetoric:
>
> Where do you start with punishment? Do you start with a comparison of those two? Do you really start with a comparison? Honors, academics, friends, life, family, opportunity, jobs, laughter, 32, 33 years. Six months. No opportunity, no job, no love, no family, except those that she left here.
>
> . . . Was this the first incident? Dr. Levy doesn't think so. Was this a continuing battering of a child? Over weeks? Broken bones, bruises, abrasions, sexual assault, shaking, death? Where does – where does punishment start? Where do you start? . . .
>
> What is this trial about? This part of the trial about? It's about holding someone responsible for their actions. It's about leaving here and telling the community some things we – we look light on. Some things we understand. And some things we can't understand. And we don't take lightly. And we don't forget. And we don't give mercy.
> . . .
> Some things are little. And they go through your mind and they're not answered. And I can't answer them either. Did it happen in that bed? Did it happen in that one? Did it happen there? Did it happen in that bed? Did it happen in that bed or did it happen in his lap? Where the cellular material was found.
> . . .
> Don't complicate this. It's not simple. . . You're looking – you're looking at man that you've already told you did it, you ain't getting away with it. And now you're here to tell him and everybody else – you don't do it here. And if you do, we're sitting in judgment. We're taking this to the bank. We're taking you, and we're taking anybody else who takes a six-month-old baby girl and rams, whatever, more than once in those places that don't heal, and takes a life . . .
> . . .
> Your answer does mean a lot. . . It tells – it tells this town, this county, this state just exactly what you feel about those injuries. You start high. And you go higher.

RR 8:142-144. Since counsel for both sides seemed to agree that Ernie was guilty of the extraneous offense – shaking Isis to death – the jury (with some misgivings) assessed punishment at 60 years confinement.

C. Juror Interviews.

The problem with obtaining verdicts based on rhetoric rather than facts is that the jurors often know in their hearts that their verdict is wrong. In this case, 8 of the 12 jurors initially voted for innocence despite the undisputed medical evidence and the State's rhetoric. Within a week, one of the jurors, Linda Russell, had signed an affidavit setting forth her qualms:

> I wish to say that I served as a juror on the Ernie Lopez trial. I felt there was more to the trial that was not brought out. I believe that Dr. Vas was not credible at all. . . I have serious questions with the Rape Examiner Nurse changing her story from mild trauma to the worst she had ever seen. I have a big problem with the timeline . . . I don't believe he was guilty . . . I don't think he did it, the sexual assault. . . The bruising on the vagina, I have a question with it. I believe when Dr. [Levy] said that he believed that the baby had prior injury to the vagina, he meant it could have been before and then when the Nurse began prodding I believe it started bleeding all over again.

Russell Aff., Ex. 15. Two other jurors, Michael Gover and David Butler, have confirmed that they too believed Ernie to be innocent but ultimately felt they were required to vote guilty because the medical evidence was undisputed, even by Ernie's counsel. Mr. Gover states:

> 5. I have sat on several juries and have been satisfied with our verdicts. However, I did not feel satisfied with the verdict in this case. The trial felt one-sided, as if the prosecutor was controlling both sides of the case. No one, not even the defense attorneys, questioned anything the prosecutors said, even when the prosecutors ignored obvious facts, such as the fact that the baby was bruised before coming to the Lopezes.
> . . .
>
> 7. At trial, the medical experts testified that the sexual assault definitely happened, and that it definitely happened when Mr. Lopez was taking care of the baby. Their testimony was unequivocal. However, even without a medical background, it didn't seem likely that Mr. Lopez could have assaulted the baby, particularly with his penis, without causing more injury than was shown in the pictures.
>
> 8. In the deliberations on guilt/innocence, I was probably the last hold out for not guilty. Based on the pictures, I didn't think Mr. Lopez had penetrated the child, certainly not in the ways portrayed by the prosecutors. Since the prosecutor's case didn't seem to make sense physically, I wanted the defense to give me

something to defend him. They didn't. In essence, his defense lawyers agreed to the medical evidence, leaving the impression that it was undisputable.. . .

12. The punishment phase of the trial was much like the earlier phase. In this phase, the medical experts testified that the child definitely died of being shaken, and that the assault definitely occurred when Mr. Lopez had the child since the child could not have survived for any longer given the nature of the brain injuries. . . .

17. As a juror, to address the prosecution's medical evidence, I needed some explanation of the evidence other than that Mr. Lopez had sexually assaulted and killed the child. We didn't get any explanation from the defense lawyers, and they didn't present an expert. Those of us who felt Mr. Lopez was innocent were left trying to make the defense case for them, without any medical knowledge or information to dispute the medical evidence.

. . .

38. Despite the medical evidence, I have never felt that Mr. Lopez was guilty, and I have always had serious concerns with the one-sided nature of the trial. To me, it felt as if Mr. Lopez was being railroaded and that the defense attorneys did not want to defend him or dispute anything that the prosecutors said, either because they didn't want to be seen as helping to release an accused sex offender or because they didn't want to offend the prosecutors.

Gover Aff., Ex. 16. Mr. Butler felt much the same:

4. The initial vote at the beginning of the deliberations on guilt/innocence was eight for innocence and four for guilt. By that time, I knew the baby had died because I overheard people talking about her death at the courthouse. I believe it was two of the other jurors. . .

6. At the end of the sexual assault part of the trial, I thought that Mr. Lopez was innocent. However, the medical evidence said he was guilty. There wasn't any medical evidence to support those who thought he was innocent, and we understood that we were supposed to rule on the evidence, not on what we felt.

8. . . . I thought that the mother had something to do with the child's death, but I didn't have any evidence.

9. The prosecutors used very large pictures of the child's genital injuries . . . It looked like there was just a little blood in that area, and it didn't look like there had been any real penetration. During the deliberations, I kept searching for another explanation for the blood spot, and I believe that other jurors were doing the same. The problem was that the nurses and doctor all testified that there weren't any other possible explanations.

10. I never did think that the child had really been penetrated. I finally thought that maybe something had rubbed on her, causing the bleeding. Since they are supposed to be experts, I took the word of the doctor and nurses that there wasn't any possible explanation for the blood in this area other than sexual assault.

11. I have since been told that bleeding in this area can have other causes, such as infection, bleeding disorders, etc. If I had known that I would not have voted guilty. . .

22. This case has always bothered me. The prosecutors' case didn't seem to make much sense, but we had to base our decision on the medical evidence.

23. Despite the medical evidence, I never really believed that Mr. Lopez was guilty.

Butler Aff., Ex. 17 (indicating that two other jurors seemed biased and that one appeared to have outside information).

D. <u>Appeal.</u>

On August 9, 2005, the Court of Appeals for the Seventh District of Texas denied Ernie's appeal, in which his counsel argued that (1) the evidence was legally and factually insufficient to support the conviction; (2) the trial court erred in continuing the punishment phase without a defense expert, violating Mr. Lopez' Sixth Amendment right to compulsory process; and (3) trial counsel was ineffective during the punishment phase. The Court affirmed the conviction but seemed perturbed by the evidence of pre-existing injury. Ct. App. Op., Ex. 112. Specifically, the Court noted evidence of the following:

1. Isis had breathing problems on Wednesday night/Thursday morning (p. 2);

2. Isis had unusual looking bumps "all over her head – her face – forehead and a little bit on her head," which were "raised and . . . dark looking" (p. 3);

3. Isis was lethargic and had a fever (p. 3);

4. DeAnn noticed bruises on Isis' chest and a change in the color of her stool, which became black in color (p. 3);

5. Isis ate very little from Wednesday until Saturday, slept a lot, and cried when her diaper was changed (p. 3);

6. Isis reportedly fell off the couch on Friday night (p. 3-4);

7. Ernie reported to the paramedics that Isis had received several spider bites and was congested (p. 4);

8. The paramedics noted bruising on the child's head, neck, shoulders and chest, but did not have any opinion on the "nature, seriousness, origin or – or age" of the bruises (p. 4);

9. Officer Taylor reported that Ernie told him of the child's breathing problems and breathing treatments, the marks on the face, neck and chest that he had been told were healing spider bites, and his efforts to revive the child (p. 5-6);

10. Officer Taylor reported that Ernie showed proper concern for the infant and was cooperative (p. 5);

11. Officer Taylor reported that the sexual assault nurse had told him that the child's injuries were "moderate" to the vaginal area and "minor" to the anal area (p. 5-6);

12. Detective Moore said that Ernie reported a "spot" in the child's nightie and several "strange colored spots" on the diaper, and that he cleaned her real well[22] (p. 6);

13. Only skin cells were found on Ernie's underwear (p. 7);

14. Due to the bruising on Isis' chest, Dr. Vas did not take Isis to the doctor the night she awoke crying and with a fever, reportedly because she "didn't want anybody to think she was abusing her child" (p. 7-8);

15. DeAnn reported that Dr. Vas spent very little time with Isis, and that from Wednesday to Saturday, Isis lacked energy, slept a lot and was listless (p. 8);

16. While no one noticed bleeding from the vaginal area while caring for Isis, no one had observed her as closely as the nurses at the hospital (p. 9);

17. The State's DNA expert agreed that there could be a transfer of DNA between the child and her caregiver as a matter of course (p. 9);

[22] There is some suggestion in the Court's opinion that this was "unlike" what Ernie had told Officer Taylor. However, there is no inconsistency in the statements. Instead, the police reports make clear that Ernie gave each officer detailed information on the events of the prior days, with each officer choosing what he/she viewed as the most important. *See also* Hueston Aff., Ex. 10(b) at 16 (*Investigating Child Fatalities*) (reminding interviewers that people do not necessarily volunteer information and that if you want specific information, you must ask for it).

18. Dr. Vas stated that she did not want to take Isis to the doctor because she was afraid of being accused of child abuse (p. 9);

19. Isis was listless and slept a lot from the time she arrived at the Lopezes until her arrival at the hospital (p. 9);

20. Isis had a fever, very little appetite and her feces changed to a dark color when brought to the Lopezes (p. 9);

21. Isis arrived at the Lopezes on Wednesday with bumps all over her head and chest which Ernie said were caused by spiders;[23] (p. 9); and

22. Ernie noticed bruises on Isis' chest (p. 9).

Ct. App. Op., Ex. 112. After reciting this evidence, however, the Court ended up in the same position as the jurors: while the Court concluded that "this evidence suggests that the infant suffered from some trauma or illness prior to the time she was left with appellant," it does not explain the extensive injury to the vaginal region occurring on October 28 while in Ernie's care. *Id.* at 9-10. What the Court – like the jurors – did not know was that there are many natural causes for bleeding and/or lacerations on the posterior fourchette, particularly in a child with a documented bleeding disorder.

The Court of Appeals also indicated concern with Ernie's trial counsel's failure to stay in touch with Dr. White and to secure his presence at trial. *Id.* at 10-11. However, the Court did not feel that it could find ineffective assistance of counsel because:

> [N]o record was developed regarding trial counsel's strategy or the nature or substance of the absent witness' testimony. This is problematic since the failure to call a witness does not constitute ineffective assistance without a showing that the witness was available and his testimony would have benefited the defendant.

Id. at 11. In short, one must show that Dr. White's testimony would have been favorable to Ernie and that defense counsel's failure to "stay in touch" with Dr. White therefore prejudiced

[23] Here, Ernie was simply repeating what Dr. Vas told him since the "bites" occurred while Isis was in Dr. Vas' care, before she came to the Lopezes.

the defense. Since the proper way to present such evidence is through a habeas petition, we are attaching to this petition the testimony that Dr. White would have presented had Ernie's defense counsel "stayed in touch" with him. White Aff., Ex. 1. As Dr. White makes clear, his testimony would have been favorable to Ernie, and defense counsel's failure to "stay in touch" prevented Ernie from receiving a fair trial. *See id.* at ¶ 16 (given medical and factual complexities, would not have been possible for Mr. Lopez to obtain a fair trial on the sexual assault or murder charges without an independent medical review or qualified defense expert).

E. Habeas Petition.

After Ernie's appeal was denied, Heather Kirkwood, a Seattle attorney, agreed to review the evidence at Ernie's parents' request. After reviewing the trial transcript and considerable medical literature on sexual assault and shaken baby syndrome, Ms. Kirkwood interviewed Ernie, reviewed his defense counsel's files, and hired Maxwell Peck as local counsel. Ms. Kirkwood also asked to review the District Attorney's file under the open file policy. The District Attorney denied her request.

In December 2005, the District Attorney offered Ernie a plea bargain which essentially gave a 20-year sentence on the capital murder charge, to be served concurrently with the 60-year sentence on the sexual assault conviction, with the proviso that Ernie would have to give up his habeas petition. Pro Hac Vice Motions, Ex. 113, Att. A. After consulting with Mr. Peck and his court-appointed counsel, David Bradley, Ernie rejected the plea bargain.

In January 2006, Ms. Kirkwood applied to the Court for *pro hac vice* admission for purposes of preparing a habeas petition on the sexual assault conviction and coordinating with appointed counsel on the capital murder case. Pro Hac Vice Motions, Ex. 113. Her motion was supported by Mr. Peck and Mr. Bradley. *Id.* The District Attorney objected to Ms. Kirkwood's

motion on a variety of grounds and stated that if Ms. Kirkwood's motion were granted, he would close the files to *all* of Mr. Lopez' counsel, including appointed capital counsel:

> If Heather Kirkwood is permitted to appear pro hac vice, the open file policy will not apply in this pending capital murder case or the related aggravated sexual assault case. Under these circumstances, the file is to be closed and discovery will be by contested hearing and court order. There will be no copying privileges to these files.

Pro Hac Vice Motions, Ex. 113 at 4 (State's Original Response and Brief in Opposition to Heather Kirkwood's Motion to Appear Pro Hac Vice). After briefing, the Court denied Ms. Kirkwood *pro hac vice* motion without explanation. *Id.*

Ms. Kirkwood has now joined the Texas Bar in order to represent Ernie. However, the State has continued to deny access to the file to Ms. Kirkwood and to Ernie's appointed counsel on the capital murder case. Since Ernie's counsel has not yet subpoenaed the medical records, these records are not available for independent review.

VI. MEDICAL EVIDENCE

A. Overview.

Ernie was convicted of aggravated sexual assault based solely on the testimony of the E.R. personnel that the sexual assault photographs taken 1 to 2 hours after hospital admission definitively established that Isis had been vaginally and anally assaulted within an hour before arrival at the hospital. In fact, the sexual assault examination photographs are inconsistent with sexual assault, and injuries cannot be timed in the manner suggested. *See, e.g.,* Soderstrom Aff., Ex. 2 at ¶ 5 (absence of injury to inner thighs, outer genitalia and hymen indicates bleeding not caused by abuse), 23, 26 (hard to imagine type of sexual assault that would cause bleeding in photographs without injuring outer genitalia or hymen; if enough pressure to exert tear below the hymen, would also expect hymenal laceration, not present here); White Aff., Ex. 1 at ¶¶ 33-34,

77 (bleeding in genital area may be secondary to pre-existing injuries or infection, aggravated by hospital treatment, including massive rehydration in combination with documented clotting disorder; no support in medical literature or records for conclusion that bleeding resulted from injuries incurred in 40 minutes that child was in Mr. Lopez' care); Pollanen Aff., Ex. 5 at ¶ 47 (no known method that would allow any nurse, clinician or pathologist to narrow timeframe to such an interval with any degree of certainty). At trial, Ernie's counsel did not introduce medical testimony or address the literature on sexual assault or timing.

At the punishment phase, Dr. Levy, the E.R. doctor, testified that Isis had been violently shaken to death within an hour before arrival at the hospital. In making this diagnosis, Dr. Levy did not consider that Isis was suffering from several potentially lethal natural disease processes, including dehydration and liver dysfunction. *See, e.g.,* Squier Aff., Ex. 3 at ¶¶ 5, 55 (laboratory tests suggest clinical dehydration and possible liver failure; child's death may have resulted from natural disease processes, including infection, dehydration and a clotting disorder, possibly aggravated by pre-existing neglect or abuse and inadequate medical care); Sunderland Aff., Ex. 4 at ¶ 6 (laboratory reports show seriously deranged chemistry; deranged liver function typically requires serious illness of days or weeks); White Aff., Ex. 1 at ¶ 127 (cannot preclude possibility of pre-existing head injury; however, also possible that child died of natural causes, such as sepsis or pneumonia, compounded by dehydration and inadequate medical care). It is not, moreover, possible to time injuries in the manner suggested by Dr. Levy. Pollanen Aff., Ex. 5 at ¶¶ 48-51, 56 (not possible to time hemorrhages with this degree of precision; no staining data provided); Squier Aff., Ex. 3 at ¶ 46 (no medical basis for concluding that brain hemorrhages occurred prior to hospital admission or within narrow time period prior to admission; no indication that special stains were used to determine age of hemorrhages; symptoms consistent

with head injury occurring several days prior to hospital admission); White Aff., Ex. 1 at ¶¶ 66, 117 (not possible to time retinal hemorrhages at all or subdural hemorrhages other than within very broad time frame; Tarrant County no longer dates subdurals since timing is not research-based and widely regarded as unreliable, particularly in infant population).

Finally, shaken baby syndrome, a popular medical hypothesis, has never been substantiated by research and most of its basic tenets have been disproven, including many of the tenets to which Dr. Levy testified at trial. *See, e.g.,* White Aff., Ex. 1 at ¶¶ 109-121 (no scientific basis for shaken baby syndrome or its corollaries; accidental and natural physiological processes may produce same results and must be excluded before concluding abuse has occurred); Squier Aff., Ex. 3 at ¶ 40 (shaken baby syndrome or other theoretical forms of nonaccidental trauma should be considered only after all other differential diagnoses, including impact, natural disease processes, hypoxia-ischemia and genetic causes, have been excluded).

Significantly, Dr. McClain, the pathologist who conducted the autopsy, did not diagnose shaken baby syndrome but testified instead that the child's death was caused by multiple blunt force impacts to the head, with facial bruises, an abrasion and hemorrhages occurring within approximately 24 hours of death. Since Isis was not removed from life support until 43 hours after hospital admission, Dr. McClain's timing estimates indicate that the hemorrhages (like the abrasion, which is not recorded on the hospital charts) occurred well after hospital admission. Since it is well established that the facial bruises were pre-existing, Dr. McClain's testimony that the facial bruising also occurred within approximately 24 hours of death is probably based on post-admission bleeding, causing bruises that were brown at hospital admission to show fresh bleeding by the time of autopsy. At trial, Ernie's counsel did not address the medical testimony on the cause of death or even point out obvious timing inconsistencies with the theories

advanced by the State's experts, leaving the jury with the impression that the State's medical testimony was undisputable.

In this section, we briefly review Isis' medical history. We then discuss the medical evidence and literature on child sexual assault and shaken baby syndrome, as well as the likely causes of the genital bleeding and death. As every reviewing physician has pointed out, while one can rule out sexual assault as the cause of the genital bleeding, it is not possible based on the existing medical evidence to precisely determine the cause of death. However, the most likely causes of death are injury, illness or infection occurring prior to arrival at the Lopez home, aggravated by improper medical treatment and dehydration. *See, e.g.,* White Aff., Ex. 1 at ¶¶ 33, 127 (medical records suggest child died of injuries and/or infection incurred while in mother's and/or maternal grandfather's care, compounded by maternal neglect, dehydration and improper medical treatment); Squier Aff., Ex. 3 at ¶ 5 (not possible to determine cause of death based on materials provided; symptoms consistent with head injury occurring several days prior to hospital admission, but materials also suggest natural disease processes, including dehydration, possible liver failure and a clotting disorder, with secondary bleeding around the brain); Sunderland Aff., Ex. 4 at ¶ 16 (abnormalities in lab reports consistent with neglect of childhood infection, inappropriate diet, assault some days earlier, insect toxin/venom and other causes, as well as with caretaker reports of illness for some days prior to collapse).

B. <u>Isis' Medical History</u>.

A medical investigation of child abuse requires an evaluation of the child's medical records. Since trial counsel did not subpoena these records, many of the relevant records are still unavailable or incomplete. However, the available records provide some insight into Isis' medical condition.

1. Birth Records. These records were subpoenaed by the police, but were not obtained by Ernie's defense counsel. Prenatal and birth records often provide information on genetic issues, congenital problems or birth difficulties that later result in illness or death. In this case, the pediatric records and affidavits indicate that the mother used alcohol, Paxil and tobacco during the pregnancy (all associated with birth defects, with Paxil particularly associated with heart defects), had a family history of heart failure, and had an infection requiring IV antibiotics at the time of Isis' birth. Medications, Ex. 58 (FDA warnings on connection between prenatal use of Paxil and heart defects in infants); Pediatrician Records, Ex. 57 at 1, 2, 14 (use of Paxil, family history of heart failure, prenatal infection); Word Aff., Ex. 22 at ¶¶ 5, 7 (use of alcohol, Paxil and tobacco during pregnancy; IV prior to induced delivery).

2. Pediatric Records. The pediatric records show that Isis was very small for her age and that her weight had dropped from above the 10th percentile to below the 5th percentile at a pediatrician appointment approximately 2 weeks before her death. Ex. 57, Pediatrician Records, Ex. 57 at 21. The pediatric records show that her vaccinations were overdue, that she had a longstanding history of *candida* diaper rash, and that there were some concerns with safety, nutrition, and household stress. Pediatric Records, Ex. 57 at 3, 4, 17; CPS Vas Investigation, Ex. 77 at 7 (pediatrician advised CPS of concerns with mother's poor judgment and neglect).

3. Clinical History. Caretaker reports indicate that Isis was neglected by her parents and that her mother's home was unsanitary. Her caretakers reported that she was unwell for nearly two months before she died, that she had lost weight, and that her mother failed to obtain medical care for a variety of illnesses and symptoms, including difficulty using her right arm. Three days before hospital admission, Isis had fading bruises on her chest and body and

multiple facial marks that her mother attributed to spider bites. Her mother did not obtain medical care for fear of being accused of abuse. Her other symptoms in the days prior to death included fever, black stool, lethargy, respiratory problems, failure to eat, irritability, and discomfort during diaper changes.

4. Hospital Records and Testimony. The hospital records and medical testimony indicate that Isis was clinically dead on arrival but was resuscitated and massively rehydrated for purposes of organ donation. As previously noted, the lab reports from blood tests taken shortly after admission showed numerous abnormalities, including a serious bleeding disorder, dehydration, abnormalities of the liver and infection. A nurse examiner also noted some bleeding and bruising in the anogenital region during an extended sexual assault examination. Ernie's trial counsel did not obtain photographs of the child's bruises, radiology reports of the CT scan and x-rays, or hospital discharge papers.

5. Autopsy Report. The autopsy report confirmed multiple bruises on the child's face and body, an abrasion on the back of the head, and various anogenital findings, discussed below. The autopsy also found a thin subdural hemorrhage and a subscalpular hemorrhage. The cause of death was listed as multiple blunt force injuries. Ernie's trial counsel did not obtain the complete autopsy evaluation, including the autopsy photographs, investigative report, x-ray report, neuropathology report, microscopic reviews, and blocks and slides, precluding an independent determination of cause of death.

6. Conclusion Based on Above Records. As previously addressed, while it is not possible to determine the cause of the child's death on an incomplete record, the medical records that are available indicate that Isis was a very sick baby who died of injuries, illness or infection occurring prior to arrival at the Lopez home, aggravated by dehydration and lack of medical

care. The diagnosis of sexual assault was based on a misunderstanding of the child sexual assault literature as well as a failure to consider the impact of a sexual assault examination on an infant with a serious bleeding disorder.

C. Sexual Assault.

The sexual assault findings consisted of a small amount of bleeding and tissue disruption in the area of the posterior fourchette; a laceration to the posterior fourchette; and discolorations in the anal area. There were no bruises to the inner thighs or injuries to the labia majora (the outer genitalia), and the hymen was intact. As discussed in more detail below, these findings are inconsistent with sexual assault.

To understand the medical evidence on sexual assault, it is necessary to understand: (1) the history of the medical evaluation of child sexual abuse, (2) the differential diagnoses for anogenital bleeding or other abnormalities in children, particularly infants; (3) the basic components of a pediatric sexual assault examination; (5) expectation and selection bias; and (6) the relevance of these factors to the medical evidence presented at trial.

1. History of Medical Evaluation of Child Sexual Abuse.

a. Early Child Sexual Assault Examinations. Beginning in the early 1980s, physicians were asked to conduct medical examinations to determine whether children had been sexually abused. Soderstrom Aff., Ex. 2 at ¶ 7. Since gynecological examinations are not generally conducted for pre-adolescents, there was little research or information on which to base such examinations or to determine whether particular findings supported an allegation of abuse. *Id.* In 1985, the medical profession convened the National Child Sexual Abuse Summit in an attempt to reach some consensus on these issues. *Id.* at ¶ 8. This meeting provided general guidelines and emphasized the need for photographic documentation of normal, as well as

abnormal, anogenital findings in children, since no one had conducted the research necessary to determine the types of pediatric anogenital findings that might fall within the normal range. *Id.*

b. Research Studies. After the Summit, several physician groups began to examine normal children to determine a base line for findings of sexual assault. They found, unexpectedly, that many of the findings previously believed to confirm abuse were also found in unabused children. *Id.* at ¶ 9. In the first study, Dr. Jean Emans and her colleagues found that there was significant overlap between girls who were not believed to have been sexually abused and those who were, and that the findings in girls who were believed to have been sexually abused were virtually identical with the findings in girls who had vaginal rashes or similar genital complaints. This study suggested that many findings previously believed to confirm abuse either fell within the range of normal or could also be caused by irritation or inflammation, possibly aggravated by scratching (or, in the case of infants, cleaning). Emans et. al, *Genital Findings in Sexually Abused, Symptomatic and Asymptomatic Girls*, Pediatrics Vol. 79, No. 5 (1987) ("Emans Study"); *see also* Soderstrom Aff., Ex. 2 at ¶ 10.

The Emans Study was followed by two research studies by Dr. McCann and his colleagues. Soderstrom Aff., Ex. 2 at ¶ 11. In the first study, the researchers found that soft tissue changes in the anal area previously viewed as evidence of abuse were also found in unabused children. They therefore emphasized the need for caution in rendering an opinion on the significance of anal findings. McCann, et. al, *Perianal Findings on Prepubertal Children Selected for Nonabuse: A Descriptive Study,* Child Abuse & Neglect 13, 179-193 (1989). In the second study, the researchers similarly found that many genital findings previously viewed as evidence of abuse were also found in unabused children. These findings included erythema (redness); hymenal mounds, projections and notches; and friability (tendency to bleed) in the

posterior fourchette, with active bleeding sometimes caused by traction. The researchers concluded that it was evident that there was an overlap in findings between unabused and abused children, and that the determination of sexual abuse could rarely rest on a physical examination alone. McCann et. al, *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study,* Pediatrics, Vol. 86, No. 3 (Sept. 1990).

c. Muram Classification. While Drs. Emans and McCann had expected to establish definitive medical signs of abuse, their research showed that *there are virtually no such signs.* To reflect the research, Dr. Muram developed a four-part classification system which, with minor modifications, is still used today:

1. Normal appearing genitalia.

2. Nonspecific findings. Abnormalities of the genitalia that could have been caused by sexual abuse but also are often found in girls who are not victims of sexual abuse (e.g., inflammation and scratching). *These findings may be the sequelae of poor hygiene or nonspecific infection.* Included in this category are redness of the external genitalia, increased vascular pattern of the vestibular and labial mucosa, presence of purulent discharge from the vagina, **small skin fissures or lacerations in the area of the posterior fourchette**, and agglutination of the labia minora.

3. Specific findings. The presence of one or more abnormalities strongly suggesting abuse. Such findings include recent or healed lacerations of the hymen and vaginal mucosa, an enlarged hymenal opening of more than 1 cm,[24] proctoepisiotomy (a laceration of the vaginal mucosa extending through the recto-vaginal septum to involve the rectal mucosa), and indentations in the skin indicating teeth (bite) marks. This category also includes patients with a laboratory confirmation of a venereal disease.

4. Definitive findings. Any presence of sperm.

Soderstrom Aff., Ex. 2 at ¶ 13 (emphasis added). This classification system is contained in the SANE Protocols. *See* Ex. 114 at 103.

[24] This is no longer recognized as a sign of abuse.

d. Implications of Research. The medical research had three important implications. *First*, the identification of abnormalities other than the presence of sperm can no longer automatically lead to a diagnosis of sexual assault, reducing the significance of the medical examination. *See, e.g.,* Muram, D., *Child Sexual Abuse – Genital Tract Findings in Prepubertal Girls,* AM. J. OBSTET. GYNECOL., Vol. 160, No. 2 (February 1989) (increased knowledge should reduce sometimes irrational expectation that the physician can determine whether child has been sexually abused"); Ex. 116, Gardner, J., *Descriptive Study of Genital Variations in Healthy, Nonabused Premenarchal Girls,* 130 J. OF PEDIATRICS 251, 255-256, (Feb. 1992) ("Gardner 1992") (inappropriate forensic significance is being attached to minor physical findings, including disruptions on the posterior fourchette and bleeding during traction; physicians should not diagnose sexual abuse on basis of physical examination alone).

Second, since unabused children also had unusual findings, including bleeding, bruises and tears, the medical profession needed to address other medical causes for such findings. This resulted in the identification of numerous differential (or alternative) diagnoses, including congenital features, accidental injury, infection (including diaper rash and contact dermatitis) and various other medical conditions. Soderstrom Aff., Ex. 2 at ¶¶ 16-17 (now widely understood that diagnosing sexual abuse from genital findings is fraught with difficulties and requires thorough evaluation of other possibilities, ranging from ordinary childhood conditions, such as diaper rash and contact dermatitis, to car accidents and other forms of accidental trauma). Today, the list of differential diagnoses is continuing to grow. *See, e.g.,* Boos, et. al, *Anogenital Injuries in Child Pedestrians Run Over by Low-Speed Motor Vehicles: Four Cases with Findings that Mimic Child Sexual Abuse*, Pediatrics, Vol. 112 No. 1 pp. 77-84 (July 2003) (chest

trauma may produce genital findings previously viewed as symptomatic of sexual abuse); White Aff., Ex. 1 at ¶ 74 (genital bleeding in victims of car accidents likely attributable to rehydration).

Third, since medical diagnoses are rarely dispositive, the diagnosis of sexual abuse now emphasizes the clinical history, other indicators of abuse, and family dysfunction. *See, e.g.,* SANE Protocols, Ex. 114 at 103 (physical findings alone generally insufficient for diagnosis of sexual abuse; diagnosis requires thorough history); Ex. 122 at x-xi, Heger et. al*, Evaluation of the Sexually Abused Child* (Oxford University Press 2000) ("Heger") (physical findings may lead us to suspect abuse but don't often tell us when and if it happened or who did it); American Academy of Pediatrics Clinical Report, Committee on Child Abuse & Neglect, Pediatrics Vol. 116, No. 2 (2005) (medical diagnosis of sexual abuse requires the presence of sperm or unexplained sexually transmitted disease; suggests multidisciplinary approach since sexual abuse often occurs in conjunction with physical abuse, emotional maltreatment, substance abuse and family violence).

2. <u>Differential Diagnoses</u>. Today, the differential diagnoses for bleeding, contusions and/or lacerations in the anogenital areas of children take up entire chapters in the medical texts, requiring a thorough understanding of child genitalia and pediatric medical conditions. *See, e.g.,* Ex. 125, Finkel and Giardino, *Medical Evaluation of Child Sexual Abuse,* (2d. ed. 2002) ("Finkel & Giardino 2002"), Ch. 8; Ex. 123, Carpenter & Rock, *Pediatric and Adolescent Gynecology* (2d ed. 2000) ("Carpenter & Rock 2000"), Chs. 2, 19, 10 and 28. In this section, we briefly review the differences between adult and child physiology; the components of a pediatric sexual assault examination; and a few of the most common differential diagnoses.

a. Differences Between Adult and Child Physiology. As the research expanded, it became clear that some of the differential diagnoses arose from differences between children and adults, including differences in physiology and hygiene needs.

(i) Physiological differences. An infant's physiology is very different than an adult's. In an adult, the posterior fourchette (i.e., the area outside the hymen), is protected by two sets of lips, the labia majora and the labia minora. RR 5:91 (Gorday). In infants, however, the labia majora do not completely cover the external genital structures, and the labia minora (the inner set of lips) extend only half way down the vaginal opening. *See, e.g.,* Ex. 125, Finkel and Giardino 2002 at 47, 50. Because of these differences, the posterior fourchette on prepubertal children is relatively exposed and prone to infection.[25] It is also very friable, i.e., it bleeds easily. Thus, this area may bleed during a routine medical examination in a sick child or during traction in a sexual assault examination. *See, e.g.,* Sunderland Aff., Ex. 4 at ¶ 12 (friable damp tissue in genitalia of sick infants may split during medical examination); Ex. 118, A. Berenson, *The Prepubertal Genital Exam: What is Normal and Abnormal*, Adolescent and Pediatric Gynecology (1994), 526, 529 ("Berenson 1994") (excellent diagram of prepubertal genitalia; friability, or bleeding, of posterior fourchette found in 5% of young girls when labial traction technique used). Similar considerations apply to the anal area, which is even more exposed and also subject to tears, fissures and infection. *See, e.g.,* Ex. 121, Muram, D., *Limitations of the Medical Evaluation for Child Sexual Abuse,* 44 J. OF REPROD. MED. 993-999 (1999) ("Muram 1999") (after defecation, minor small fissures may be seen for 2-3 weeks; reddening of anal area may be noted with fecal soiling); *see also* Bays, Ex. 115 at 1320.

[25] Technically, prepubertal children do not have a posterior fourchette, which is defined as the area between the hymen and the posterior meeting of the labia minora. Since the labia minora do not meet on children, this area is properly called the "posterior commissure." We use the term posterior fourchette since it is used in the trial transcript as well as much of the medical literature.

(ii) Hygiene. Two important hygiene considerations affect the diagnosis of sexual assault in young children: young children, particularly infants, almost always wear diapers and need adult care in cleaning. For children in diapers, it is well established that the irritation caused by wearing diapers, as well as consequent rashes and dermatitis, can be confused with sexual trauma. *See, e.g.,* Ex. 120, Kellogg et. al, *Children with Anogenital Symptoms and Signs Referred for Sexual Abuse Evaluations,* 152 ARCH. PEDIATR. ADOLESC. MED.639 (July 1998) ("Kellogg 1998") (candidiasis, irritation and erythema, or redness, of anogenital area common in younger children due to hygiene problems and irritation associated with diaper wearing; children presenting with anogenital bleeding, bruising or irritation typically not found to be sexually abused); Muram 1999, Ex. 121 at 997 (vulvar irritation fairly common in small children as result of poor local hygiene, maceration of skin due to wetness from diapers; such nonspecific findings should not be regarded as diagnostic of sexual abuse); Heger 2000, Ex. 122 at 132 (*candida* infection common in diaper rash; may present with areas of excoriation; requires medical treatment); Carpenter & Rock 2000, Ex. 123 at 132-134 (differential diagnoses include diaper rash and other types of inflammation, sometimes resulting from poor hygiene); Finkel & Giardino 2002, Ex. 125, at 164-167 (various pediatric infections causing bleeding, including *candida*, may be confused with sexual abuse by inexperienced examiner); Ex. 115, Bays J. & Jenny, C., *Genital and Anal Conditions Confused with Child Sexual Abuse Trauma,* 144 A.J. OF DISEASES OF CHILDREN, 1319, 1320-1321 (1990) ("Bays & Jenny 1990") (erythema and excoriations of genitalia not specific to sexual abuse; other common causes include diaper dermatitis, poor hygiene, *candida,* pinworms and irritants such as bubble bath).

Because young children are not able to take care of their own hygiene needs, caretakers are required to clean the anal and external genitalia of young children. As the State's experts

realized, since the rectum and vaginal area are very close in an infant, stool may go up into the area of the posterior fourchette, requiring cleaning and sometimes medication. The need for hygiene creates a tension between caretaking and the medicolegal diagnosis of sexual assault. As a practical matter, this tension is generally resolved through common sense on the part of prosecutors and the medical personnel. If the child becomes very ill or dies, however, a sexual assault examiner who is not familiar with pediatric gynecology may suspect or diagnose sexual abuse based on discoloration or bleeding in the anogenital area without consideration of the physiology of a small child or the child's overall medical condition. In the *Wilson* case (discussed below), for example, abnormalities around the anus caused by diarrhea from E. coli was misdiagnosed as sodomy by a sexual assault nurse examiner at Northwest Texas Hospital. Ex. 169(c).

b. Pediatric Sexual Assault Examination and Diagnosis. Because there are many possible causes of bleeding, bruising or discoloration in the anogenital area of children, the sexual assault examination and diagnosis must include a complete medical history, thorough physical examination, and laboratory tests. *See, e.g.,* Finkel & Giardino 2002, Ex. 125 at 39, 254, 258. The medical history should include the patient's birth history; family, social and developmental histories; symptoms as reported by the caretakers; and a review of all body systems, with particular emphasis on the genitourinary and gastrointestinal systems. The possibility of urinary tract infection, diaper dermatitis, painful or unusual bowel movements and diarrhea must be investigated before diagnosing sexual abuse, as these conditions can mimic trauma or abuse. Since sexual abuse is often accompanied by physical abuse or neglect, any findings suggesting physical abuse or neglect should be described in detail and documented, preferably through photographs or videodocumentation. *Id.* at 257-258; *see also* SANE

Protocols, Ex. 114 at 106, 108 (examination should include general physical examination, interview and photographs of all nongenital injuries, with and without a scale to document size and, preferably, color), 69 (nurse examiner must be knowledgeable about all types of injury patterns), 94 (pediatric examinations require considerable familiarity with the physiology of children and ability to distinguish between normal and abnormal findings). Because of the physiology of children, the examination itself is visual and gentle, rather than invasive or painful. *See, e.g.,* SANE Protocols, Ex. 114 at 100 (examiner applies traction to the labia majora and gently pulls in an outward and downward direction, which allows full visualization of the hymen); Carpenter & Rock 2000, Ex. 123 at 491 (labia majora gently grasped, spread a little bit laterally, and carefully pulled toward the examiner; excessive lateral stretch can result in painful, albeit slight, tear of posterior fourchette in presence of even small posterior labial adhesion).

c. Differential Diagnoses. Based on Isis' genital and extragenital injuries, it is evident that sexual abuse should not be the first and only diagnosis. Instead, Isis' medical history – including *candida* diaper rash diagnosed over a four-month period, poor hygiene while in her mother's care, massive bowel movements with black stool for two days prior to death, and a sexual assault examination conducted while she had a documented bleeding disorder – indicates that her anogenital findings were caused by some combination of irritation, infection, a bleeding disorder and the sexual assault examination itself.

(i) Irritation and infection. As discussed, it is well established that irritation, rashes and dermatitis caused by wearing diapers can be confused with sexual trauma. Kellogg 1998, Ex. 120 at 637; Muram 1999, Ex. 115 at 1320; Carpenter & Rock 2000, Ex. 123 at 132; Finkel & Giardino 2002, Ex. 125 at 175. Diaper rash is caused by friction, wetness and exposure to stool and urine, and can result in a secondary infection with *candida* (Carpenter & Rock 2000) and can

cause erythema, excoriation, redness, bleeding, fissures and skin changes in the genital or anal regions (Bays & Jenny 1990; Kellogg 1998).

The differential diagnosis in a young child must also include the possibility of other types of infection, including vulvovaginitis, a common bacterial infection seen in young girls due to a lack of physical protection in the genital area (relatively small labia majora, no labial fat pads or pubic hair). Because of the close proximity of the rectum to the vagina, especially in an infant, the vagina is easily contaminated by fecal matter, especially when combined with poor perineal hygiene. Symptoms of vulvovaginitis include pain and vaginal bleeding. Heger 2000, Ex. 122, Ch. 8; Carpenter & Rock 2000, Ex. 123, Ch. 10. Vulvovaginitis can be caused by infections such as Group A β-hemolytic streptococcus or simply by wearing diapers and becoming infected by fecal matter. Carpenter & Rock 2000, Ex. 123, Ch. 10. Group A β-hemolytic streptococcus can also cause perianal dermatitis, which mimics anal trauma since it is difficult to distinguish an infected rash from abrasions. Finkel & Giardino 2002, Ex. 125, Ch. 8. Lichen sclerosus is another possibility. Like Group A β-hemolytic streptococcus, lichen sclerosus is often confused with sexual abuse or trauma due to the similar presenting symptoms of anogenital bleeding, bruising and/or irritation. Kellogg 1998, Ex. 120 at 640. Lichen sclerosus affects up to 15% of children, predominantly females, causing excoriations, pupura, fissuring and bleeding. Finkel & Giardino 2002, Ex. 125, Ch. 8.

(ii) Bleeding and general bowel disorders. Hematologic (bleeding) disorders may cause bruising in the genital or anal area that can be confused with child abuse. Bays & Jenny 1990, Ex. 115 at 1321. Since severe or chronic constipation or diarrhea can cause anal changes or injuries that mimic abuse, it is important to investigate the frequency and character of stool (Finkel & Giardino 2002, Ex. 125, Ch. 8) and any history of significant straining with bowel

movements. Carpenter & Rock 2000, Ex. 123, Ch. 28. As previously indicated, defecation may produce perineal redness and minor fissures that can be seen for up to three weeks. Muram 1999, Ex. 121 at 996. In this case, Isis had both a documented bleeding disorder and a three-day history of massive bowel movements with black stool and notable discomfort, either of which would explain bleeding in the genitalia.

(iii) Other illnesses. Genital bleeding may also be secondary to an overall illness, generalized bleeding, childhood illnesses, or hospital treatment in a sick child. Since the body does not distinguish between the genitalia and other parts of the body, bleeding or ulcerations in the genital area may be linked to bleeding or ulcerations in other parts of the body. *See, e.g.,* Carpenter & Rock, Ex. 123 at 127-128; *see also,* White Aff., Ex. 1 at ¶ 105; Soderstrom Aff., Ex. 2 at ¶ 30-32.

(iv) Routine care and cleaning/sexual assault examination. Bleeding, bruising, irritation, abrasions and lacerations on the posterior fourchette have been linked to inflammation and hygiene and can presumably be caused by cleaning an infant with a diaper rash and/or bleeding disorder. Muram 1999, Ex. 121 at 996 (fissures or lacerations in the posterior fourchette are nonspecific and possibly result of nonspecific infection or poor perineal hygiene); Ex. 10(d), Giaradin et. al, Ch. 3 (by fingernail scratches). *See also* Soderstrom Aff., Ex. 2 at ¶ 27; Sunderland Aff., Ex. 4 at ¶ 12. Bleeding and tears may also be caused by the sexual assault examination itself. *See, e.g.,* Gardner 1992, Ex. 116 at 256; Berenson 1994, Ex. 118 at 529; Carpenter & Rock 2000, Ex. 123. Indeed, the literature emphasizes the importance of being gentle and careful during the examination to avoid "the potential risk of inadvertent nosocomial sexual abuse."[26] Carpenter & Rock 2000, Ex. 123, Ch. 2.

[26] "Nosocomial" is defined as "taking place or originating in a hospital."

3. Expectation and Selection Bias. Despite the efforts of the medical profession, diagnoses of sexual abuse are often characterized by expectation and selection bias. Expectation bias occurs when medical personnel see what they expect to see, based on their own biases or what they have been told. *See, e.g.* Muram 1999, Ex. 121 at 994, 995 (once initial diagnosis formulated, physicians tend to support working diagnosis rather than try to refute it and to discount findings that do not support their initial diagnosis). Selection bias occurs when a particular group self-selects to include only those with a particular bias. When expectation and selection bias coincide, diagnosis of sexual abuse may be made and corroborated *without any consideration of the medical or research literature.* In the field of child sexual abuse, this tendency has been exacerbated by a lack of knowledge of pediatric gynecology. *See, e.g., Pediatric News* 2001, Ex. 124 (in 2000 survey of 166 primary care physicians, including family physicians and pediatricians, 38% incorrectly identified the hymen, 21% incorrectly identified the labia majora, 17% incorrectly identified the labia minora, 28% incorrectly identified the urethra, and 6% incorrectly identified the clitoris); Ex. 126, Makoroff et. al, *Genital Examinations for Alleged Sexual Abuse of Prepubertal Girls: Findings by Pediatric Emergency Medicine Physicians Compared with Child Abuse Trained Physicians*, 26 CHILD ABUSE & NEGLECT 1235-1242 (2002) ("Makoroff 2002") (very high error rate in sexual abuse diagnoses by pediatric emergency room physicians; in 79% of cases in which Pediatric Emergency Medicine physicians diagnosed findings indicative of sexual abuse, child-abused physicians diagnosed normal exam or nonspecific findings, with 70% being normal and 9% nonspecific). As this suggests, sexual abuse is greatly over-diagnosed in the E.R.

4. Trial Testimony. As Dr. Soderstrom points out, the testimony of the E.R. personnel shows a lack of understanding of the literature and research on child sexual assault.

Most notably, the E.R. personnel: (a) confused infant and adult genitalia; (b) characterized "nonspecific" findings as "definitive" of abuse; (c) failed to consider differential diagnoses; (d) ignored findings indicating that the child had not been abused; (e) provided highly prejudicial testimony; (f) conducted an improper sexual assault examination; and (g) provided incorrect testimony on timing that has medical or scientific support.

a. Confusion of Infant and Adult Genitalia. At trial, the E.R. personnel described adult, rather than infant, genitalia. Thus, Ms. Gorday diagrammed the labia majora, labia minora and other genital features of the female anatomy "as if a lady was laying on the bed with her feet up in the stirrups." RR 5:91; *see also* RR 5:84 (describing woman standing without any clothes on with "labia majora hanging down"); RR 5:91. As her testimony suggests, Ms. Gorday did not understand that an infant's genitalia is different:

State: . . . am I understanding the outer lips serve as a kind of protection?

Gorday: Oh, absolutely. That's – their sole role is to actually protect all of that inner organs in there.

State: As we have had it explained to us before, there is another set of, I'm not sure, you call them lips but there is another set?

Gorday: Of labia.

State: Of labia, okay. So there is another set of protection?

Gorday: Right.

State: Even inside of – of the outer?

Gorday: Right.

RR 5:94 (describing labia minora, or inner lips, as meeting at the "bottom"). In fact, the labia majora in children are relatively undeveloped and the labia minora extend only halfway down the

genital opening in prepubertal children. Thus, the posterior fourchette is relatively exposed. Finkel & Giardino 2002, Ex. 125 at 50.[27]

b. Confusion of "Nonspecific" and "Definitive" Findings of Abuse. The SANE Protocols make clear that the only definitive finding of sexual assault is the presence of sperm and that bleeding, tears and lacerations on the posterior fourchette are nonspecific findings with many possible causes, including poor hygiene and infection. SANE Protocols, Ex. 114 at 103. Yet the emergency personnel testified repeatedly that bleeding and tears on the posterior fourchette can only be caused by abuse. *See, e.g.,* RR 5:55 (Fanelli) (active bleeding is caused by forceful penetration); RR 5:68 (O'Neal) (fresh blood trickling out of a six-month-old was very significant; trauma to posterior fourchette means that some kind of forceful penetration has taken place); RR 5:126 (Gorday) (lacerations are caused by force); RR 6:169-170 (Levy) (any destruction of tissue, such as a tear, rip, bruising, bleeding, is of serious and violent nature).[28] As this suggests, the E.R. personnel were not familiar with the literature on child sexual assault.

c. Failure to Consider Differential Diagnoses. Because the E.R. personnel believed that bleeding and tears in the posterior fourchette could only be caused by sexual assault, they did not consider differential diagnoses. Thus, they did not take a careful history or even interview the primary caretakers. Nor did they review all systems or consider the laboratory reports, which showed a documented bleeding disorder and numerous other abnormalities. Indeed, despite diagnosing sexual assault, Ms. Gorday testified at trial that "I don't know anything about [the child's] medical past, or medical history." RR 5:172. Despite this lack of knowledge, she rejected virtually all differential diagnoses, including those that were

[27] Part of the problem may be that Ms. Gorday appears to be an adult E.R. nurse. The SANE Protocols emphasize that it is essential for pediatric SANEs to understand pediatric anatomy. SANE Protocols, Ex. 114 at 94.

[28] In general, it seems clear from his testimony that Dr. Levy is not familiar with infant genitalia or the difference between normal and abnormal findings. Soderstrom Aff., Ex. 2 at ¶ 28.

documented in the medical records. *Compare, e.g.,* RR 5:172 (did not see any signs of infection), RR 5:173 (did not learn of any platelet or bleeding disorders), RR 5:176 (did not see any indication child's immune system was suppressed), and RR 5:101-102, 161-162 (no injury can be caused by any sexual assault examination or cleaning) *with* Laboratory Reports, Ex. 55 (laboratory tests showing numerous abnormalities, including infection and bleeding disorder); White Aff., Ex. 1 at ¶¶ 58-59 (numerous signs of illness in laboratory reports and hospital records); Sunderland Aff., Ex. 4 at ¶¶ 6, 12 (serious abnormalities in laboratory tests; tears/bleeding in children's genitalia may be caused by medical exam in sick child). Since Ms. Gorday did not familiarize herself with the facts or the medical literature, she should not have been permitted to testify as an expert. *See, e.g.,* Ex. 119, Ledray & Barry, SANE Expert and Factual Testimony, J. OF EMERG. NURSING, Vol. 24, No. 3 (1998) at 284, 286 (if SANE testifies as an expert, must relate specific facts to published literature and empirical studies on which she relies).

Dr. Levy testified that he did not look at the child's genitalia until the nurses had completed their examinations and that he diagnosed sexual abuse based on the photographs. This is a major problem since the type of examination conducted by Ms. Gorday would almost certainly have caused significant damage, particularly in a sick child with a bleeding disorder (discussed below). Unlike Ms. Gorday, Dr. Levy testified that he considered the "whole patient" in making his diagnosis. RR 6:194; RR 6:175 (put puzzle together based on the entire systems of the whole patient). However, at trial, Dr. Levy did not mention the child's clinical history or symptoms, the laboratory reports (including the documented bleeding disorder), or any of the possible differential diagnoses (including the sexual assault examination itself). His hospital notes similarly contain no evidence of any effort to consider differential diagnoses.

d. Failure to Consider Evidence that the Child was Not Sexually Abused. Ms. Gorday and Dr. Levy also failed to consider evidence that the child was not sexually abused. In addition to negative findings from the sexual assault examination kit, the photographs confirmed that there were no injuries to the labia majora or inner thighs, and the hymen was intact. Soderstrom Aff., Ex. 2 at ¶¶ 5, 23, 26, 33. Dr. Levy excluded accidental trauma based on these findings:

> As in any injury of that nature, we would first see injury on the outside. Where they come together. And when I look at those photographs, there is no – I do not see any bruising, redness, distortion, scrapes, abrasions [or] anything. When you let them come back together, they look normal. They are stained. But the skin, the tissue architecture, the way it looks is normal. And you can't bypass that and traumatize on the inside. It is not possible.

RR 6:182-183 (further notes that there is no bruising on the outside; all internal to the labia majora); *see also* RR 5:164 (Gorday) (injury could not be accidental given absence of trauma to labia majora).

The same considerations apply to violent sexual assault. Had Ernie assaulted Isis – particularly with, as the State later suggested, his penis, hand or fist – he would most certainly have damaged the child's outer genitalia, hymen and/or inner thighs. As Dr. Soderstrom states:

> It is hard to imagine a type of sexual assault that would cause the type of bleeding portrayed in these photographs without injuring the outer genitalia or hymen. If enough pressure were exerted to cause a tear below the hymen, one would also expect a hymenal laceration, not present here. Given the small distance between the labia majora and the hymen in an infant, the insertion of even a small adult finger would almost certainly cause a hymenal tear or laceration [while] the exertion of force would likely cause injury to the labia majora and/or inner thighs.

Soderstrom Aff., Ex. 2 at ¶ 23. Or, as Dr. Levy put it, "you can't bypass [the labia majora] and traumatize on the inside. It is not possible." RR 6:183.

The photos thus establish that if Isis was sexually assaulted, she was sexually assaulted by someone with sufficient knowledge of infant anatomy and technical skill to touch the

posterior fourchette without harming the labia majora or penetrating the hymen. On an infant, these distances are so tiny that it is difficult for even a trained nurse to locate the opening and insert a catheter:

> State: Is that difficult to insert a Foley?
>
> Gorday: Yes, it can be. Particularly in infants.
>
> State: And to do that, if you were going to insert a Foley, you would have to spread the – the lips?
>
> Gorday: Right. Open up the – the labia or the lips in order to see that area.
>
> State: Physically show us how you would – how you would spread the – the lips to be able to do this. Can one person insert the Foley? Does it take two people to do that?
>
> Gorday: If you are talented it can take one. *In infants a lot of times you need assistance because you are going to actually grab hold of the labia and open up, or some nurses will pull traction toward them, and sometimes God should give nurses three arms, because you have to do this and also insert the Foley.*

RR 5:92. Yet, according to the State, Ernie was able to open the lips, unassisted, and use some instrument (in the State's closing argument, possibly his hand, penis or fist) to touch the posterior fourchette without harming the hymen, outer lips or inner thighs. *See* RR 7:191. There is, however, no evidence that Ernie had the medical training (let alone the inclination) to conduct an assault with such precision, or even that such an assault is possible. Instead, it appears that the only explanation that fits the facts is not a sexual assault by Ernie but an overly-intrusive sexual assault *examination* conducted by a professional using Q-tips on a child with a bleeding disorder, a process that may have occurred not just once but twice.

All of the other objective medical evidence confirmed that Isis was not sexually assaulted. The sexual assault examination kit was negative – no sperm, no pubic hairs, nothing to suggest that the child had been raped. Police Reports, Ex. 63 at 26-27; RR 6:55 (Burgess)

(rape exam kit negative for semen and hair). The serology reviews reported that there was no staining on Ernie's clothing, the DNA results were consistent with transference and childcare, not sexual assault, and there were no signs of blood on the child, the child's clothing or the child's bedding, as one would expect had the child been sexually assaulted shortly before the arrival of the emergency personnel. *See* Johnson Aff., Ex. 6 at ¶¶ 10-11, 14-15; Sunderland Aff., Ex. 4 at ¶ 12.

e. Improper Sexual Assault Diagnosis and Examination. The sexual assault examination and diagnosis in this case violated every published protocol. In making the diagnosis, the E.R. personnel did not obtain the medical history, interview the primary caretakers, conduct a complete systems review, consider the laboratory reports, or conduct a differential diagnosis. Even the physical examination left much to be desired: the photographs are not timed or dated, Ms. Gorday did not know what magnification she used, there are apparently no photographs of the bruises that covered the child virtually from head to toe, and Ms. Gorday indicated that she was not going to prepare a report until the police developed and returned the photographs.[29] *Compare* SANE Protocols, Ex. 114 at117 (photos should be time and date stamped), 71 (magnification to be documented), 68 (all bruises to be carefully photographed, preferably with measuring and color tool), 122 (paperwork to be completed before leaving clinic).

Most important, the physical examination was anything but gentle. It did not consist of a "look, don't touch" approach or gentle traction. Instead, Ms. Gorday collected specimens as she went along (RR 5:101) and repeatedly "flipped" the hymen with a Q-tip. *See, e.g.,* RR 5:126 (photo 35, hymen "flipped up"); RR 5:127 (photo 36) ("[w]hat I'm doing with that Q-tip, is I am

[29] The hospital records do not indicate when Ms. Gorday prepared her report. If she did not prepare the report until after the autopsy report was returned, her findings of a laceration, which is not visible in the photographs, may simply be an effort to correlate her report with the autopsy findings.

flipping that hymen up out of the way"); RR 5:129-130 (photo 38) (Ms. Gorday "repositioning her . . . body parts"); RR 5:131 (photo 39) ("I have this Q-tip, and I have flipped up her hymen to move it out of the way"); RR 5:134 (photo 40) (hymen "kind of folded in on itself"); RR 5:136 (photo 41) ("scrunching her bottom up," with "hymen pushed over to the side"); RR 5:137-139 (photo 42) (hymen "flipped up," had to move hymen around to be able to see what she needed to see). If a sexual assault examination on a well child and/or an ordinary medical examination on a sick child can cause tears and bleeding in the genitalia, the sexual assault examination described by Ms. Gorday would certainly cause substantial damage on the posterior fourchette (the area of greatest stretch) of a sick child with a documented bleeding disorder.

f. Highly Prejudicial Testimony. Despite the absence of any objective evidence of sexual assault, the E.R. personnel gave dramatic portrayals of the events surrounding the alleged "injuries." For example, they all testified that Isis would have been inconsolable, presumably from severe pain. *See, e.g.,* RR 5:56 (Fanelli) (injuries very severe and would cause great deal of pain, possibly requiring IV medication; would expect screaming for long period of time); RR 5:71-72 (O'Neal) (injuries very painful, would cause almost inconsolable crying); RR 5:162 (Gorday) (injuries could not have been caused without pain; not possible to console for extended period of time); RR 6:186-187, 198 (Levy) (believe child cried inconsolably when diaper wet or soiled because she couldn't "get any relief from what's going on").[30] There is no medical support, however, for the proposition that an infant would be in severe pain from what was, initially, a split-pea size drop of blood on the posterior fourchette, an area that bleeds easily.[31] There is, moreover, no evidence that Isis cried inconsolably while in Ernie's care. Had she done

[30] Since Isis cried every time her diaper was changed for 2 ½ days before hospital admission, Dr. Levy's testimony suggests that if Isis was sexually assaulted (which seems unlikely), the injuries preceded her arrival at the Lopez home.

[31] It seems more likely that an infant might cry inconsolably from a sexual assault examination in which a nurse applied forceful traction and used a Q-tip to repeatedly "flip her hymen."

so, one would have expected that the children would have been upset by the crying and that her older brother, Alex, would have said something at his own interview.[32] Instead, when the emergency personnel arrived, the children were sitting at the kitchen table and seemed "curious" rather than upset. *See, e.g.,* RR 5:12 (AFD reported older children sitting at kitchen table; appeared to be doing fine; nothing to indicate unsafe environment); R. Lopez Aff., Ex. 32 at ¶ 9 (children curious, not upset); 911 Call (Transcript at Ex. 50) (Ernie attempting to keep children out of the way; children sound interested as fire trucks approach but not upset).

Other portions of the trial testimony were equally prejudicial. For example, in Photograph 41, Ms. Gorday described the posterior fourchette as "lacerated" and like "hamburger meat." RR 5:136; *see also* RR 5:160 (to cause injuries, would have to use sandpaper and put finger up vaginal entroitus area). However, Photograph 41 – the eleventh in the series taken in the Pediatric ICU – was taken *after* Ms. Gorday had spent considerable time flipping the child's hymen and exploring the area with a Q-tip. *See also* White Aff., Ex. 1 at ¶ 106 ("hamburger meat" description more consistent with abrasion, irritation or inflammation, rather than laceration). Dr. Levy further testified that Isis' injuries were just like "what a woman goes through when she has childbirth, and the head of the baby comes down, and she breaks posteriorally." RR 6:186. Even leaving aside the physical differences between sexual assault and childbirth, Isis' hymen did not break at all; instead, it was intact, precluding injury of the type described by Dr. Levy. *See* Soderstrom, Ex. 2 at ¶ 21.

g. Incorrect Testimony on Timing. Of all the errors in the medical testimony, the greatest error consisted of the efforts of the E.R. personnel to time the injuries to the 40-minute period during which Ernie cared for the child. As Drs. White and Pollanen make clear in their

[32] The two older Vas children and the older Lopez children were taken for sexual assault examinations the day after Isis' death. We understand that the older children were also interviewed at The Bridge. It is our understanding that none of the children disclosed or showed any signs of abuse.

affidavits, it is not medically or scientifically possible to time injuries in this manner. White Aff., Ex. 1 at ¶¶ 27, 34; Pollanen Aff., Ex. 5 at ¶¶ 46-52. Because there was no scientific basis for their testimony, the E.R. personnel were able to shift their timing estimates as needed to match the State's theories.

h. Expectation and Selection Bias. This case presents an excellent example of expectation and selection bias. These biases appeared in several forms.

First, immediately upon seeing a small drop of blood on the posterior fourchette during the attempted insertion of a foley, the E.R. nurses concluded that Isis had been violently penetrated. Indeed, Ms. Gorday testified that she knew from her initial look in the emergency room that it was "pretty extensive and severe injuries." RR 5:99. Ms. Gorday maintained this diagnosis without considering the lack of external injury or injury to the hymen, the differential diagnoses, the laboratory reports, or the medical literature. The sexual assault examination may, moreover, have been approved even before the attempted insertion of the foley. If so, there would have been no legal or medical basis for the sexual assault examination, suggesting severe bias on the part of the E.R. personnel. If review of the records indicates that this is what happened, it would require exclusion of the sexual assault examination report, which would have resulted from an unauthorized search.[33]

Second, there is reason to believe that Ms. Gorday may have been personally biased. One of Ernie's sisters-in-law reported the following conversation:

> During the trial, I met David Isern's fiancée, Tiffany . . . [Tiffany] said that she had attended a criminal justice class in which Ms. Gorday was a speaker. She said that Ms. Gorday used very crude language for body parts and described her brother and father molesting her. Tiffany said that she was very detailed in her

[33] It is unclear why the emergency room personnel did not obtain permission for the sexual assault examination from Dr. Vas, rather than the District Attorney, since Dr. Vas was in cell phone contact with the emergency room, where Ms. Gorday was the nurse in charge, by 11:34 a.m., shortly after hospital admission. Vas Phone Records, Ex. 78.

> descriptions of what they had done and that she seemed unprofessional. My impression was that Tiffany thought that Ms. Gorday had an agenda and would be a biased witness.

C. Lopez Aff., Ex. 34 at ¶ 12; *see also* Shannon Lopez Aff., Ex. 33 at ¶14 (Tiffany indicated that Gorday was very explicit about her own abuse, used vulgar terms, and seemed unprofessional). Professor Harry Hueston, a professor of criminal justice at West Texas A&M, confirms that this lecture occurred in one of his classes:

> Ms. Gorday used overheads to describe the SANE procedures. In describing female body parts, she used graphic terms. For example, instead of using vagina or similar technical terms, she used "c---" or "pus--." . . .
>
> Ms. Gorday . . . said that she herself had been sexually molested as a child and talked about her experiences for three or four minutes. I was surprised at her disclosures, which were detailed. At this point, I do not remember the details but believe that the molestations were by family members.

Hueston Aff., Ex. 10 at ¶¶ 5-6. Even if Ms. Gorday merely intended to suggest that some rape victims might be more familiar with vulgar terms, as Professor Hueston suggests, her behavior suggests a lack of professionalism as well as the possibility that her judgment may be impaired, particularly in cases involving children. *See, e.g.*, SANE Protocols, Ex. 114 at 43 (essential for nurses who were victims themselves to resolve own issues through formal counseling prior to employment as SANE).

Selection bias of this nature is not uncommon in the child abuse arena. As Mr. Wilson pointed out in his closing argument, Ms. Gorday's bias may be a "noble" bias – but it is also a bias that may lead to over-diagnosis of sexual abuse. Such personal biases may be exacerbated by a tendency to emphasize convictions over medical accuracy. *See, e.g.,* SANE Protocols, Ex. 114 at 22 (having SANE collect evidence and be available to testify in court has resulted in more guilty pleas and increased conviction rates; two SANE programs operating for more than 10 years have "impressive 96-percent conviction rate in cases in which the SANE did the exam").

Third, in diagnosing sexual assault, the biases of the E.R. nurses caused them to violate the Texas Nursing Practice Act, which explicitly prohibits nurses from making medical diagnoses. TEX. OCC. CODE ANN. § 301.002(2) (professional nursing "does not include acts of medical diagnosis"); SANE Protocols, Ex. 114 at 8-9 (SANEs must operate within parameters of State Nursing Practice Act; evaluation and diagnosis of pathology is beyond scope of SANE examination). In this case, the nurses did not know the child's medical history or laboratory results, nor did they have the breadth of medical knowledge needed to identify the cause of bleeding in a dead or dying child with a bleeding disorder. They were also operating without oversight since Dr. Levy did not conduct an independent examination and was not familiar with the literature on child sexual assault.

Fourth, the relationship between Dr. Vas and Northwest Texas Hospital is an obvious source of bias.[34] Since Isis was covered with old bruises when she arrived in the emergency room, there were really only two choices: if Isis had been abused, she had most likely been abused either by a former colleague, an ob/gyn, or by her babysitters. Within minutes, the E.R. personnel settled on the latter option, without determining the time line, interviewing the primary caregivers, or considering that, in this case, it was the doctor, not the babysitters, who was known for poor judgment and negligent childcare.

i. Correct diagnosis. Since the subjective diagnosis of sexual assault by the E.R. personnel is contradicted by objective evidence (including lack of injury to the external genitalia and a negative sexual assault examination kit), the question remains: what caused the bleeding and disruptions on the child's posterior fourchette and discoloration around the anus? While this

[34]Dr. Vas completed her residency at Northwest Texas Hospital three months before Isis' death. We do not know whether she had personal or professional relationships with the E.R. staff who testified at trial.

question cannot be definitely answered without access to complete medical and pathological records, it is likely that the genital findings were caused by some combination of:

1. the *candida* diaper rash documented in the Pediatric Records;

2. the urinary tract infection documented in the laboratory reports;

3. abdominal injury, as suggested by the chest bruises, bloody stool and serology report (noting blood in fecal area);

4. the cleaning of black sticky stool from the anal and vaginal areas on Friday night and Saturday morning;

5. the bleeding disorder documented in the laboratory reports;

6. the extended chest compressions documented in the 911 call and medical records;

7. the attempted insertion of the foley in a child with a bleeding disorder;

8. the sexual assault examination itself; and

9. dehydration and massive rehydration, causing bleeding in various parts of the body.

See, e.g., White Aff., Ex. 1 at ¶¶ 71-75; Sunderland Aff., Ex. 4 at ¶ 12. As the medical reports make clear, while our society may attach special significance to genital bleeding, the body does not differentiate between bleeding in the genitalia and bleeding in other parts of the body. Like other parts of the body, the genitalia may bleed as a result of specific infections or overall body conditions, including hospital procedures such as rapid rehydration. Indeed, the genital area is particularly prone to bleeding since it is vascular (like the mouth) and friable (i.e., bleeds easily). Since Isis was subjected to numerous procedures, including an invasive sexual examination, during a period in which she had a documented bleeding disorder, the bleeding observed by the E.R. personnel and shown in the sexual assault examination photographs does not suggest sexual assault: instead, it was likely the natural consequence of pre-existing inflammation or infection

and highly traumatic medical interventions, including extended CPR, massive rehydration and an extended sexual assault examination.

D. Cause of Death.

At the punishment phase, the State's witnesses introduced two possible causes of death -- shaken baby syndrome and blunt force injuries to the head. Essentially, Dr. Levy testified that the same person (presumably Ernie) had abused Isis for weeks, as evidenced by her bruises, and then shaken her to death within an hour of hospital admission. Dr. McClain, on the other hand, testified that Isis died of blunt force injuries to the head occurring within 24 hours of death, as evidenced by the bruises and an abrasion. Both of these theories undermined the State's theory that Ernie had injured Isis, for Ernie did not cause Isis' bruises: these bruises were brown on admission, indicating that they occurred before she came to the Lopezes and long before she was in Ernie's care. Ernie's defense counsel did not, however, point out that neither of the State's theories fit the facts.

It is easy to see how Dr. Levy and Dr. McClain reached their conclusions. They were presented with a child who was covered with bruises, and they felt, reasonably enough, that whoever caused the bruises most likely also caused the child's death. Since no one took a clinical history, Dr. Levy and Dr. McClain seemed unaware that Isis had been very ill for 2 ½ days before her death, that Isis' bruises had occurred while in her mother and grandfather's care, and that her mother had refused to obtain medical care for fear of being accused of abuse.[35] Thus, they assumed that Isis' death was caused by major trauma shortly before hospital

[35] Although the first police officer who interviewed Ernie obtained much of what Ernie knew about Isis' symptoms, including the spider bites, the medical personnel largely ignored this information. So far as we can determine, neither the police nor the medical personnel interviewed DeAnn or Charles Vas, who were the child's primary caretakers in the week before her death, though both were in Amarillo.

admission. Dr. Levy and Dr. McClain reached different conclusions, however, on the relationship between the bruises and the death.

Since Dr. Levy knew that the bruises were old (they were described as "brown" on the hospital chart), he connected the bruises and the death by testifying that all of Isis' injuries – including an injury to the clavicle 3-4 weeks old, the old bruises on her face and body, and recent hemorrhages – were caused by the same person. If Dr. Levy is correct, however, the perpetrator was not Ernie, for the bruises did not occur while Isis was in Ernie's care.

Dr. McClain connected the bruises and abrasion to the hemorrhages in a different manner. Since the bruises had turned purple by autopsy, Dr. McClain assumed that these were new bruises and that Isis had suffered blunt force injuries to the head shortly before her death.[36] If Dr. McClain is correct that Isis died of blunt force injuries, as evidenced by facial bruises, the perpetrator is not Ernie, for the bruises did not occur while Isis was in Ernie's care.

Dr. McClain's testimony also suggests, however, another possibility. At trial, Dr. McClain testified that the vaginal, subdural and subscalpular hemorrhages occurred within 24 hours (give or take a few hours) of death. Since Isis was on life support until the organ harvest, which ended at 5:40 a.m. on Monday, October 30, this places the hemorrhages as occurring sometime after 2:30 a.m. on Sunday, some 15 hours after hospital admission. If Dr. McClain's timing is correct, therefore, the hemorrhages were post-admission artifacts and had nothing whatsoever to do with Isis' death.

If the hemorrhages are artifactual, this leaves the cause of death wide open. The original autopsy conclusion of multiple blunt force injuries may still be correct, with the injuries occurring prior to arrival at the Lopez home. Given the clinical history and laboratory reports,

[36] This change in coloration confirms that there was post-admission bleeding in these areas, probably caused by rehydration and the documented bleeding disorder.

however, there are many other possibilities. *See, e.g.,* White Aff., Ex. 1 at ¶ 127 (cannot preclude injury prior to arrival at Lopez home; however, also possible child died of natural causes, such as sepsis or pneumonia, compounded by dehydration and inadequate medical care); Sunderland Aff., Ex. 4 at ¶¶ 6-7, 13, 15-16 (highly abnormal laboratory results suggest serious illness of days or weeks, consistent with caretaker reports; medical possibilities include blow to abdomen or other abuse several days prior, fall from sofa, venom from insect bites with secondary consequences, untreated childhood infection, and the like); Squier Aff., Ex. 3 at ¶ 5 (medical evidence consistent with head injury several days prior but should also consider presence of natural diseases, including infection, dehydration and bleeding disorder). As Dr. White points out, a correct diagnosis should fit and hopefully explain all of the facts, including the clinical history, the lab reports and the time line. White Aff., Ex. 1 at ¶ 87. In this case, the State's theory was inconsistent with all three.

Without access to the medical records and slides, it is not possible to determine the cause of death with specificity. However, based on presently available information, the most likely explanations for Isis' death are:

(1) Blunt force injuries occurring prior to arrival at Lopez home, aggravated by dehydration and inappropriate medical care;

(2) Short-term illness or infection (sepsis) beginning prior to arrival at Lopez home, aggravated by dehydration and inappropriate medical care; or

(3) Long-term illness or medical condition, aggravated by any or all of the above.

See, e.g., White Aff., Ex. 1 at ¶¶ 89, 90, 93. Additional medical information may help differentiate between these alternatives. Pollanen Aff., Ex. 5 at ¶¶ 57-58, 60, 63.

In this section, we first discuss Dr. Levy and Dr. McClain's testimony. We then briefly review the likely causes of death based on the available medical records.

1. Shaken Baby Syndrome. Dr. Levy diagnosed shaken baby syndrome shortly after hospital admission based solely on the bruises and retinal hemorrhages. RR 8:23. At trial, Dr. Levy testified that a CT scan (presently unavailable but which appears to have been taken at about 7:30 p.m.) confirmed his diagnosis. *Id.* To understand the problems with Dr. Levy's diagnosis, it is necessary to understand the history of shaken baby syndrome. After briefly reviewing this history, we discuss specific errors in Dr. Levy's testimony.

a. History of Shaken Baby Syndrome. Shaken baby syndrome was suggested in the early 1970s by John Caffey, a radiologist, as a possible explanation for the retardation and/or death of children who had subdural and retinal hemorrhages without external signs of abuse. Caffey theorized that retinal and subdural hemorrhages may be caused by violent shaking. Ex. 130, J. Caffey, *The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities with Whiplash-Induced Intracranial and Intraocular Bleeding, Linked with Residual Permanent Brain Damage and Mental Retardation,* 54 PEDIATRICS 396-403 (1974). Although this theory quickly became popular, no medical research was conducted on the correlation between shaking and retinal and/or subdural hemorrhages. Instead, for nearly three decades, the medical profession simply assumed that the caretakers – who often described sick babies with respiratory or other medical problems – were untruthful and that shaking was the only explanation for the hemorrhages other than a documented motor vehicle accident or major fall.

Over the decades, the following hypotheses became part of shaken baby theory: (1) to cause subdural and retinal hemorrhages, the perpetrator must use massive shaking force, typically described as the equivalent of a motor vehicle accident or fall from a 2-3 story building; (2) short falls cannot produce subdural or retinal hemorrhages; (3) shaken baby syndrome may be diagnosed from the presence of retinal and subdural hemorrhages; (4) shaking causes diffuse

axonal injury (DAI); and (5) there is no lucid interval between subdural hemorrhages and death. Each of these subsidiary hypotheses has, however, been largely or entirely disproven. In addition, two reviews of the medical literature and a law review note have concluded that there is no reliable medical or scientific basis for shaken baby syndrome. Ex. 145, Donohoe, M., *Evidence-based Medicine and Shaken Baby Syndrome, Part I: Literature Review 1966-1998,* 29 AM. J. FORENSIC MED. PATHOL. 239-242 (2003) ("Donohoe 2003"); Ex. 151, Leestma, J., *Case Analysis of Brain-Injured Admittedly Shaken Infants, 54 Cases, 1959-2001*, 26 AM. J. FORENSIC MED. PATHOL. 199-212 (2005) ("Leestma 2005); Ex. 172, Lyons, G., *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Topic,* 2003 UTAH L. REV. 1109, 1119, 1126-1132 ("Lyons 2003").

b. Errors in Dr. Levy's Testimony. Dr. Levy's testimony contained numerous errors. First, although Dr. Levy initially described the cause of death as "a traumatic brain injury – blunt force injury to [the head]," he spent virtually his entire testimony talking about shaken baby syndrome. This testimony was contrary to the autopsy findings, which concluded that Isis died from blunt force injuries, not shaking. Second, Dr. Levy's testimony is inconsistent with the research literature. Today, virtually every aspect of Dr. Levy's testimony has been disproven, and it has become clear that the syndrome itself lacks evidentiary support.

(i) Massive force. Dr. Levy testified that the type of damage that Isis sustained required "violent shaking." RR 8:37. He then described the force required:

> State: What type of force are we talking about?
>
> Levy: We are talking about an extreme violent force. In the literature, the other time that we have noticed similar injuries are in fatal motor vehicle crashes, which are extremely violent.
>
> State: Is this comparable to that?

Levy: For that period of time, it approximates that severity of – of force that is applied to – to that area.

RR 8:39, 40 (this type of fatal brain injury more likely to be caused by fall out of second story window, but would then see some external impact), 8:51 (have seen similar brain and retinal injuries in fatal vehicular crashes, which tend to be impact in nature; this is a way to compare forces). As Dr. White points out in his affidavit, however, the force from human shaking is not comparable to the force of a motor vehicle accident or fall from a 2-story building. Indeed, in 1987, a study conducted by Dr. Duhaime and her colleagues concluded, based on animal studies and biomechanical models, that human beings cannot shake a baby hard enough to cause subdural hemorrhages. Ex. 131, Duhaime, A. et. al, *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. NEUROSURG. 409-415 (1987) (shaking alone cannot produce shaken baby syndrome; impact is required; fatalities due to uncontrollable brain swelling, not subdural hemorrhage; acute brain swelling particularly common in pediatric population, with cause poorly understood). Duhaime's work was confirmed in a more recent paper by Professor Ommaya, whose work had formed the basis for Dr. Caffey's original hypothesis. Ex. 140, Ommaya et al, *Biomechanics and Neuropathology of Adult and Pediatric Head Injuries,* 16 BRIT. J. NEUROSURG. 220-242 (2002) (shaken baby syndrome based on misunderstanding of Ommaya research; injury to infant requires greater force than comparable injury to adult and would almost inevitably cause damage to neck and spinal cord; levels of force required for shaking to cause retinal bleeding biomechanically improbable). *See also* White Aff., Ex. 1 at ¶¶ 112, 118; Squier Aff., Ex. 3 at ¶ 37 (biomechanical research indicates not possible to create sufficient forces through shaking to cause subdural or retinal hemorrhages; cases involving such severe forces would be expected to suffer neck injuries, which do not appear to be present in this case).

(ii) Shaking v. impact. Dr. Levy also testified that the hemorrhages could not be caused by a fall off a couch, even with impact. The biomechanical research makes clear, however, that even a very short fall with impact creates a far greater force than shaking. White Aff., Ex. 1 at ¶ 118; Ex. 140, Ommaya et al, *supra* (biomechanics of three foot fall for toddler produces force ten times greater than maximum force that can be achieved by shaking; unlike forces caused by shaking, such falls produce forces sufficient to cause traumatic injury, including subdural and retinal hemorrhage); Ex. 147, Goldsmith & Plunkett, *A Biomechanical Analysis of the Causes of Traumatic Brain Injury in Infants and Children,* 25 AM. J. FORENSIC MED. & PATH. 89-100 (June 2004) (comparison of "shaking" injury to two-story fall not justifiable given inability of humans to produce such force; fatal falls may occur from 2-10 feet; differentiation between abuse and accident usually not possible based on medical symptoms but requires thorough analysis of injury mechanisms and tolerance thresholds, with much research remaining to be done). Dr. Levy's testimony that the hemorrhages could not be caused by a fall off a couch but could be caused by shaking was, in short, biomechanically incorrect. In fact, while unlikely to cause death without neck injury (not found in this case), a short fall would be far more likely than shaking to cause the hemorrhages observed at autopsy. *See also* Sunderland Aff., Ex. 4 at ¶ 13 (there are witnessed cases of backwards falls followed by subdural hemorrhage; acceptable explanation for subdural hemorrhage in child with deranged coagulation).[37]

(iii) Retinal and subdural hemorrhages. As indicated, Dr. Levy initially diagnosed shaken baby syndrome based solely on the bruises and retinal hemorrhages. RR 8:23; *see also* Complaint, Ex. 62. What Dr. Levy did not tell the police – or the jury – is that there are many causes for retinal hemorrhages, including infection and bleeding disorders. *See Ex parte Briggs,*

[37] An excellent video of a recent experiment by Dr. Thibault illustrates vividly that the forces from a short backwards fall far exceed any force that could be generated by shaking. *See* Ex. 154, Thibault, K., *Pediatric Head Injury – A Biomechanical Perspective* (2006) (video enclosed).

187 S.W.3d at n. 8 (retinal and subdural hemorrhages may result from natural causes, such as sepsis, bacterial endocarditis, and disseminated intravascular coagulation, citing Spitz, Werner, Russell, *Medicolegal Investigation of Death* 710 (3d ed. 1993) and LeFanu, J, Edwards-Brown, R., *Patterns of Presentation of the Shaken Baby Syndrome – Subdural and Retinal Hemorrhages Are Not Necessarily Signs of Abuse,* BMJ 328:767-769 (2004)). The list of differential diagnoses for retinal hemorrhages has, moreover, continued to grow even since *Briggs. See, e.g.,* Ex. 153 (forensic pathologist Patrick Lantz at February 2006 meeting of the American Academy of Forensic Sciences confirms that retinal hemorrhages are associated with many types of natural death, including meningitis, bleeding disorders, hemorrhagic strokes, ruptured cerebral aneurysms and diabetes, and cannot therefore be viewed as confirming or suggesting child abuse or shaken baby syndrome); Squier Aff., Ex. 3 at ¶ 38 (retinal hemorrhages have many natural as well as traumatic causes, including brain swelling and increased intracranial pressure, citing Lantz 2006 and Vinchon 2005); *see also* White Aff., Ex. 1 at ¶ 69 (nontraumatic causes for retinal hemorrhages include bleeding disorders, sepsis, meningitis, vasculopathies, increased intracranial pressure, rehydration and possibly extended CPR), ¶ 120 (referencing Lantz study).

There are an equally large number of possible causes for subdural hemorrhages. *See, e.g., Ex Parte Briggs*, 187 S.W.3d n. 8 (citing LeFanu & Edwards-Brown; subdural hemorrhages may be caused by sepsis or bleeding disorders); White Aff., Ex. 1 at ¶ 117 (very difficult to distinguish between brain hemorrhages caused by recent trauma and brain hemorrhages caused by other factors, such as sinus venous thrombosis, bleeding disorders, sepsis, rapid rehydration, and re-bleeds of prior injuries; research lacking in infant population, making conclusions on causation difficult and unreliable); hemorrhages in all parts of body may be caused by rapid rehydration); Squier Aff., Ex. 3 at ¶¶ 31-34 (subdural hemorrhages are nonspecific and have

numerous nontraumatic causes, including infections such as meningitis, dehydration, hypoxia/ischemia, or lack of oxygen or blood supply to the brain). It is our understanding that a soon-to-be published research study using computer simulations will show that, in infants, subdural hemorrhages may also be caused by coughing and/or choking. *See also* Squier Aff., Ex. 3 at ¶ 43 (subdural hemorrhages and other findings may be linked to clinical history of respiratory difficulty in days prior to hospital admission and choking on feed in morning prior to arrest).

There are also different types of subdural hemorrhages. Dr. Levy described the type of subdural hemorrhage that is associated with serious car accidents, namely, a broad subdural resulting from a tearing of the bridging veins throughout the subdural space. RR 8:37-38, 52. As Drs. Squier and Sunderland note, however, the subdural hemorrhage noted at autopsy does not appear to be a subdural hemorrhage of this type but is instead described as "thin" and "within and attached to the undersurface of the dura." Autopsy Report, Ex. 56. It is also very small (a "few clots of blood") and clearly insufficient to cause death. *See* White Aff., Ex. 1 at ¶ 64. This suggests that this hemorrhage was not a true subdural at all but instead represented bleeding or leakage from the dural veins. This type of bleeding is not associated with force or abuse, but is instead associated with sinus venous thrombosis, dehydration and/or rehydration. *See, e.g.,* Squier Aff., Ex. 3 at ¶¶ 5, 33-34 (bleeding around the brain described at autopsy may be secondary to other disease processes or, given the clotting disorder, may have resulted from post-admission hospital procedures; description of subdural hemorrhage suggests venous sinus thrombosis, which is associated with infections, dehydration, disturbances of coagulation, metabolic disorders, nutritional deficiencies and the like, rather than trauma); White Aff., Ex. 1

at ¶ 64 (hemorrhage of this type may be caused by brain swelling; hypoxia or lack of oxygen; bleeding disorders; and/or rapid rehydration).

(iv) Diffuse axonal injury (DAI). An underlying tenet of shaken baby syndrome is that shaking causes diffuse axonal injury, or DAI, by damaging the nerve cells within the brain. In 2000-2003, however, a series of research studies led by Dr. Jennian Geddes, an English neuropathologist, found that the brains of presumably shaken babies did not show widespread nerve damage to the brain (DAI), as expected, but rather showed hypoxia or lack of oxygen, secondary to brain swelling and raised intracranial pressure – findings that are also found in nontraumatic injury. *See* Ex. 144, Geddes et al, *Dural Haemorrhage in Non-traumatic Infant Deaths: Does it Explain the Bleeding in 'Shaken Baby Syndrome'?,* 29 Neuropathology and Applied Neuropathology 14-22 (2003); Ex. 136, *Neuropathology of Inflicted Head Injury in Children I: Patterns of Brain Damage,* 124 BRAIN 1290-1298 (Oxford Univ. Press 2001); Ex. 137, Geddes et. al, *Neuropathology of Inflicted Head Injury in Children II: Microscopic Brain Injury in Infants*, 124 BRAIN 1299-1306 (Oxford Univ. Press 2001) (accidental injury in infants may cause subdural and retinal hemorrhages; review of literature suggests scanty scientific evidence for traumatic damage; symptoms appeared hypoxic rather than traumatic, consistent with reports of respiratory abnormalities reported by caretakers; subdural hemorrhages typically trivial; similar axonal injury found in head-injured and non-head-injured group). In short, there is no longer any reason to suspect that the small hemorrhages found in allegedly shaken babies were caused by trauma rather than natural causes.

(v) Timing. Dr. Levy testified that Isis' hemorrhages could be medically established as occurring within an hour prior to hospital admission. ***There is, however, no medical or scientific support for this claim.*** Retinal hemorrhages cannot be dated at all, and subdural

hemorrhages are dated through post-mortem neuropathological stains. *See* Pollanen Aff., Ex. 5 at ¶¶ 47-51; White Aff., Ex. 1 at ¶ 117 (retinal hemorrhages cannot be dated; dating of subdurals is difficult, unreliable and no longer performed in Tarrant County). The dating methodologies that are available, moreover, are inexact, broad (typically able to distinguish only between greater or less than 48 hours), and cannot distinguish at all between pre- and post-admission bleeding. Pollanen Aff., Ex. 5 at ¶ 51; Squier Aff., Ex. 3 at ¶¶ 22, 46 (does not see any medical basis for concluding that hemorrhages in brain occurred prior to hospital admission or within narrow time period prior to admission; assessment of timing of brain hemorrhages requires thorough review of neuroradiology on admission and neuropathological review of brain slides; neither trial testimony or autopsy report indicates that special stains used to determine age of hemorrhages); White Aff., Ex. 1 at ¶ 66 (not generally possible to date subdural hemorrhage other than within very broad time frame), ¶ 117 (categories of dating subdural hemorrhages not research-based and widely regarded as unreliable, particularly in infant populations, citing Ex. 152, H. Whitwell, *Forensic Neuropathology* (Hodder Arnold 2005). Since Dr. Levy did not conduct the tests necessary to time the hemorrhages – he is not a pathologist, and these tests are conducted on slides prepared after autopsy – it appears that he simply assumed that the child died of injuries inflicted shortly before death. While one often sees claims in the child abuse literature that retinal and subdural hemorrhages are followed immediately by death, this claim is contrary to the medical literature, which establishes that most head injury deaths are delayed. *See, e.g.,* White Aff., Ex. 1 at ¶ 116 (in Geddes I, the average survival time was over 27 days; in Leestma literature review, 8 of 11 "shaken" children, 10 of whom had acute subdurals, survived); *see also* Hueston Aff., Ex. 10(b), *Investigating Child Fatalities* at 4 (death often delayed in cases involving head injuries in children).

(vi) Battered Child Syndrome. In his testimony, Dr. Levy confused shaken baby syndrome and battered child syndrome. Unlike shaken baby syndrome, which is an unproven hypothesis, battered child syndrome describes a pattern of escalating abuse against a particular child. White Aff., Ex. 1 at ¶ 125. While Dr. Levy's description of battered child syndrome is essentially correct, the syndrome does not fit Ernie, for Isis' bruises did not occur in his care. Instead, if Isis was a victim of battered child syndrome, the perpetrator was either her mother, whose history of neglect is well-documented, or her grandfather, who was caring for Isis when her injuries and illnesses occurred. *Id.* (given time line, if Isis was victim of battered child syndrome, the timing of the bruises indicates that the perpetrator is the mother or grandfather, not Mr. Lopez).

(vii) Failure to consider differential diagnoses. In diagnosing shaken baby syndrome very shortly after hospital arrival, Dr. Levy did not consider the differential (or alternative) diagnoses or take a proper history, and he strayed outside his area of expertise. Had Dr. Levy interviewed DeAnn, who came to the hospital expecting to be interviewed, he would have realized that Isis was a sick baby who had taken only 4-6 ounces of fluid in the 2½ days before her death, which would alone have been sufficient to cause death from dehydration irrespective of the underlying injury or illness. RR 6:189 (Levy). He would have also realized that the child's bruises arose when in her mother or grandfather's care, and that they might be infected spider bites (as reported by the mother), rather than signs of abuse. Because he jumped to a conclusion, Dr. Levy also failed to see the implications of the information that he did have. For example, the laboratory notified Dr. Levy immediately of Isis' abnormal coagulopathy, and he responded by ordering fresh frozen plasma infusions to help with clotting. See Laboratory Reports, Ex. 55; *see also* RR 8:31 (Levy) (ordered plasma to help with clotting). Dr. Levy did

not, however, consider the impact of this coagulopathy on post-admission bleeding, including the vaginal and brain hemorrhages. *See* White Aff., Ex. 1 at ¶ 26 (no indication in medical records that any effort made to distinguish between pre- and post-admission bleeding, a significant problem since child's first coagulation studies show a serious clotting or bleeding disorder shortly after admission). As this suggests, Dr. Levy diagnosed shaken baby syndrome without considering the research, the time line, the lab reports or the differential diagnoses.

(viii) Lack of scientific basis. In recent years, two researchers have conducted literature surveys to assess the extent and validity of the scientific support for shaken baby syndrome. Both concluded, in essence, that there is no reliable scientific basis for shaken baby syndrome. Donohoe 2003, Ex. 145 (research literature on shaken baby syndrome lacks scientific reliability and controls; SBS evidence consists of small data base of poor quality original research without appropriate controls, with no SBS studies meeting standard for valid empirical research or diagnostic assessment; without research base, commonly held opinion that finding of subdural and retinal hemorrhages in infants is strong evidence of SBS cannot be sustained); Leestma 2005, Ex. 151 (extensive review of medical case literature revealed only 11 cases of admittedly shaken babies with no sign of cranial impact; small number of cases does not permit valid statistical analysis or support for commonly stated aspects of shaken baby syndrome; cannot be determined whether subdural and retinal hemorrhages are caused by inflicted or accidental physical forces or underlying or secondary disease processes). A law review note that surveyed the medical literature reached the same conclusion, ultimately concluding that testimony on shaken baby syndrome does not meet the standards set forth in *Daubert.* Ex. 172, Lyons, G., *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept,* 2003 Utah L. Rev. 1109 (2003).

2. Blunt Force Injury to the Head. In the autopsy report, Dr. McClain gave the cause of death as multiple blunt force injuries, leaving open the possibility of trauma to the abdomen, as evidenced by chest bruises. At trial, however, Dr. McClain limited the cause of death to blunt force injury to the head. While Dr. McClain testified that the brain hemorrhages could occur from shaking (which is likely incorrect), she made clear that the injuries in this case arose from blunt force trauma to the head occurring within approximately 24 hours of death, as evidenced by the facial contusions and abrasion. This timing does not, however, fit the facts. As previously discussed, the bruises were brown on hospital admission and thus could not have occurred within 24 hours of death; the abrasion was most likely an artifact; and the time period suggested by Dr. McClain indicates that all injuries (including the hemorrhages) occurred when Isis was in the hospital. Given these disparities, the primary evidence must be reevaluated to determine a more precise timing of all injuries and cause of death.

3. Cause of Death: Differential Diagnoses. Since the theories advanced by the State's witnesses do not fit the facts, it is apparent that there is a need for differential (or alternative) diagnoses. To obtain a more precise diagnosis, it will be necessary to conduct a complete review of the medical evidence, including the radiology reports, photographs, brain slides and birth records. *See* White Aff., Ex 1 at ¶ 29 (list of materials required to conduct forensic investigation of death); Squier Aff., Ex. 3 at ¶ 56 (given complexities of medical records and clinical history, more specific cause of death should be sought; brain scans and any residual brain tissue and dura should be reviewed to look for evidence of venous sinus or cortical vein thrombosis; more detailed autopsy notes, including photographs, brain slides and neuropathology reports, should also be reviewed or reevaluated in light of the child's medical condition, history and lab results). In reviewing these materials, the following possibilities should be considered:

a. Head Injuries. If the marks on Isis' forehead were caused by abuse, Isis likely suffered head injuries prior to arrival at the Lopez home.

b. Abdominal injuries. The combination of old bruising to the chest and black stool suggests abdominal injuries occurring prior to arrival at the Lopez home.

c. Sepsis or widespread infection. The insect bites diagnosed by Dr. Vas and the laboratory reports (specifically, high white blood cell count and e. coli cultured from the urine) suggest infection or sepsis. Given the lack of hygiene in the home and Dr. Vas' practice of leaving Isis outside on a blanket, unattended, a pathological review should also consider infections carried by roaches, spiders, ticks, other insects and/or rats.

d. Bleeding disorder. The laboratory reports show a bleeding disorder, which may explain some pre-admission bruising or bleeding and suggests that the hemorrhages noted at autopsy may be post-admission artifacts.

e. Dehydration. As Dr. Levy testified, since Isis refused formula and drank only 4-6 ounces of juice in the 2 ½ days prior to death, dehydration alone would have been sufficient to cause death.

f. Liver dysfunction. The serious abnormalities in liver function suggest that Isis may have been suffering from liver disease for days or weeks prior to hospitalization, requiring further analysis of the transplant records.

g. Pneumonia. The caretaker reports of respiratory distress are supported by laboratory reports showing kliebsella pneumonia cultured from the lungs.

h. Improper medical care. The medical care provided by Dr. Vas in the days before Isis' death was inappropriate and may have caused further damage.

i. Accidental injury. The lack of supervision and aggressiveness of Isis' older brother suggests the possibility of accidental injury prior to arrival at the Lopezes. The short fall off the couch the night before hospital admission could also have caused small hemorrhages, particularly with a bleeding disorder.

j. Congenital conditions. Congenital heart disease should be considered given Dr. Vas' family history of early heart disease, the use of Paxil in pregnancy, and Isis' failure to thrive in the months before death.

k. Childhood illnesses. Common childhood diseases such as chickenpox and/or a vaccine reaction should be considered, particularly since Isis' health may have been already compromised.

l. Nutrition. Given the history of neglect, nutritional deficiencies should be considered, since these would have made the child less able to respond to trauma or disease. There is also substantial literature linking Vitamin C deficiency to fatalities following vaccinations.

m. Improper medical care. Dr. Vas' provision of inappropriate medical care in the days before death should be considered as a contributing factor.

White Aff., Ex. 1 at ¶¶ 91-93 (on this record, alternative explanations for death include sepsis, possibly caused by spider bites or E. coli; hypoxia or lack of oxygen, likely caused by respiratory problems; pneumonia; and/or dehydration, possibly caused by inadequate medical care). Significantly, none of these possible causes for Isis' symptoms and death are attributable to Ernie or to events occurring in the 40 minutes during which Ernie cared for Isis and the other children. To the contrary, even the State's experts agreed that Isis' death was almost certainly linked to the bruises and/or marks that covered the child's face and body. And if there is one fact that is absolutely clear, it is that Ernie did not cause these bruises: instead, the bruises occurred well before Isis came to the Lopezes.

VII. LEGAL ANALYSIS

A. Introduction

Over the past decades, it has become clear that innocent people can be convicted, and it is now routine to read in the newspaper that prisoners have been cleared by DNA evidence. In many cases, however, there is no DNA evidence *for the simple reason that no crime was committed.* The child abuse arena appears to be particularly prone to false convictions. After centuries of ignoring child abuse, there have recently been periods of frenzied allegations and convictions, often based on expert testimony. Since the expert testimony has often *preceded* the research, however, it has sometimes later proven to be wrong. Indeed, a distinct pattern has emerged: as research in a particular area becomes available, fewer cases are brought, defendants

win more cases at trial -- and the falsely convicted slowly straggle out of prison, sometimes decades later.

In the mid-1980s, for example, there were many accusations and convictions of daycare providers based on allegations of sexual abuse and Satanic rituals described by preschoolers. By the early 1990s, however, the psychological research established that these bizarre allegations did not result from abuse, but from improper interviewing techniques. *See, e.g.,* S. Ceci & M. Bruck, Jeopardy in the Courtroom (1995) (American Psychological Association) (summarizing literature establishing that improper interviewing techniques produce false information, particularly on sexual abuse). Eventually, most of the daycare convictions were overturned. *See generally* Ex. 176. By that time, the medical research was also establishing that the physical findings previously used to confirm child sexual abuse also had innocent explanations. *See, e.g.,* Exs. 114-126.

The new learning did not, however, spread rapidly or uniformly. Instead, as some of the falsely convicted were being released, new scandals, such as the Bakersfield and Wenatchee child sex abuse scandals, emerged, fueled by aggressive prosecution combined with ignorance of the literature. Eventually, virtually all of these convictions were overturned, with the last of the falsely convicted emerging from prison by 2000 (Wenatchee) and 2004 (Bakersfield). *See generally* Ex. 176. Individual defendants were, however, often less fortunate, since they did not generally have access to the legal resources needed to overturn their convictions. In addition, new types of child abuse claims were emerging to replace the old. One of these was shaken baby syndrome, a syndrome that was presented as a hypothesis in the 1970s, adopted largely on faith

by the medical and legal professions in the 1980s and 1990s, and largely discredited by 2003.[38] At present, many shaken baby cases are being dropped by prosecutors, won by the defense or overturned on appeal – while yet others are being brought, often in defiance of the research.[39]

As this suggests, the legal and medical communities have often proven incapable of distinguishing between child care and child abuse, and between natural and unnatural child deaths. In this context, the question arises: what are the responsibilities of the legal system? The short answer is clear: the legal system is responsible for ensuring that all defendants, particularly those accused of highly emotional crimes, receive a fair trial. In addition, when convictions were based on fundamentally flawed evidence, the legal system is responsible for correcting these errors.

In this case, Ernie was convicted because he did not receive basic constitutional protections, including effective assistance of counsel. In addition, his conviction was based on incorrect expert testimony. These fundamental errors, with others, produced a false conviction for crimes that likely did not occur at all and that certainly were not attributable to Ernie.

B. Ineffective Assistance of Counsel.

1. General Legal Standards. A defendant is guaranteed the right to effective assistance of counsel under the U.S. and Texas Constitutions. U.S. CONST. amend. VI, XIV; TEX. CONST. art. I, § 10. A petitioner is entitled to habeas relief if: (1) counsel's performance

[38] Two types of "shaken baby" injuries remain of concern. The first involves neck injuries, not present in this case. The second involves impact, typically evidenced by bruising, in which case shaking is largely irrelevant. In this case, the old bruising indicates that if shaking or impact occurred, it occurred prior to arrival at the Lopez home.

[39] As Dr. Squier notes in her affidavit, the English courts rejected the "triad" of subdural hemorrhage, retinal hemorrhage and brain swelling as diagnostic of abuse and/or shaken baby syndrome in July 2005. Squier Aff., Ex. 3, ¶ 31 (from medical perspective, diagnosis of abuse requires detailed clinical, pathological and neuropathological review and exclusion of other possible causes). We have provided in Exs. 173 and 174 two other relatively recent decisions addressing shaken baby syndrome – a very recent Ninth Circuit opinion (2006) that may be destined for the Supreme Court and a well-reasoned decision by an Australian court (2001). In Texas, the Court of Criminal Appeals addressed similar issues in *Ex Parte Briggs.* As these decisions indicate, the Courts on three continents are likely to be grappling with these issues in the years to come.

was deficient, i.e., fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1994); *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005). To provide effective assistance, counsel has a duty to make reasonable investigations, or to make a reasonable decision that particular investigations are unnecessary. *Strickland*, 466 U.S. at 691; *Briggs*, 187 S.W.3d at 467. In making an investigation, an attorney must acquaint himself with the facts of a case and obtain appropriate expert assistance, including expert review of a child's medical records in cases involving child deaths. *Flores v. State,* 576 S.W.2d 632, 634 (Tex. Crim. App. [Panel Op.] 1978) (fundamental duty to learn facts); *Briggs,* 187 S.W.3d at 467, n.22 (if investigation of medical records to determine child's cause of death is needed to prepare effective defense, counsel cannot decline to conduct such investigation even if client has no funds, for without such investigation counsel is not in a position to cross-examine or impeach adverse witnesses, citing ABA Standards for Criminal Justice); *see also U.S. v. Tucker,* 716 F.2d 576, 581 (9th Cir. 1983) (duty to obtain appropriate experts, including accounting experts in fraud cases). To sustain a challenge, the petitioner must show that counsel's conduct did not constitute sound trial strategy and that the deficiencies prejudiced the defense. *Strickland*, 466 U.S. at 689, 696; *Briggs*, 187 S.W.3d at 469. To determine prejudice, the impact of errors must be assessed in the aggregate. *Ex parte Welborn,* 785 S.W.2d 391, 393, 396 (Tex. Crim. App. 1990) (en banc); *Moore v. Johnson,* 194 F.3d 586, 619 (5th Cir. 1999).

In this case, Ernie's defense counsel did not investigate the medical issues and thus were unable to present or even articulate a defense. Since this failure in and of itself constitutes ineffective assistance of counsel and cannot be characterized as sound trial strategy, we discuss it first. We then identify other deficiencies that, singly or together, prejudiced the defense.

2. <u>Medical Records and Testimony</u>. This case rested in its entirety on the testimony of the E.R. personnel. There was no other evidence suggesting that Ernie had injured Isis: to the contrary, all other evidence indicated that the child had not been assaulted by Ernie and that Ernie was an exceptionally good caretaker. The only issue, therefore, was whether the E.R. personnel correctly diagnosed sexual assault and shaken baby syndrome, all occurring within an hour of hospital admission.[40] Since Ernie's counsel did not investigate these issues, they deprived Ernie of any defense.

a. <u>*Briggs* Standards</u>. The standards for failure to investigate medical issues in a case involving a child death are set forth in *Ex parte Briggs*, *supra.* In *Briggs*, defense counsel obtained the medical records of a child who had pre-existing medical problems, including infection, a bleeding disorder, pneumonia, and brain swelling, but did not retain a medical expert to review the records because Ms. Briggs and her parents did not provide the necessary funds (estimated at $2,500-$7,500). The Court of Criminal Appeals held that the failure to obtain an expert review of the medical evidence constituted ineffective assistance of counsel since counsel has an absolute duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case." *Id.* at 467 (quoting the ABA Standards for Criminal Justice). Without adequate investigation of the medical issues, a lawyer cannot effectively cross-examine or impeach adverse witnesses, conduct plea discussions, or prepare a defense. *See id.* at n.22.

In *Briggs,* the clear and obvious defense strategy was to focus on the child's medical history and cause of death. Indeed, the sole issue was: "How did [the child] die? Was his death

40 The pathologist did not testify on the sexual assault charge or confirm the "shaken baby" diagnosis, relying instead on bruises to establish blunt force injury as the cause of death. Had Ernie's counsel understood the facts and medical issues sufficiently to conduct a proper cross-examination, the pathologist's testimony would likely have been exculpatory.

a homicide or was it the result of natural causes, exacerbated by improper medical treatment?" *Id.* at 468. As the Court pointed out, under these circumstances, the failure to fully investigate the medical records could not be viewed as a strategic decision. Because the medical evidence was essential to a defense, the Court held that if a client cannot afford medical experts, a reasonably competent attorney would: (1) subpoena the treating doctors and introduce the medical records through them; (2) withdraw from the case, prove indigency, and request appointed counsel; or (3) remain as counsel with a reduced fee, but request expert fees from the trial court for a now-indigent client. *Id.*. Since trial counsel did not take any of these steps, Ms. Briggs was deprived of effective assistance of counsel—a failure that most likely affected her decision to plead guilty and to "confess" to killing her child.[41]

In this case, as in *Briggs*, Ernie's defense counsel were ineffective because they failed to address the medical issues. Their deficiencies included the failure to: (1) subpoena the medical records; (2) review the records that did become available, seemingly by happenstance; (3) obtain an independent expert review or arrange for expert medical testimony; and (4) familiarize themselves with the medical literature on child sexual assault and shaken baby syndrome. In addition, Ernie's lead counsel did not familiarize himself with the facts of the case. Since these issues were critical, the failure to investigate was not a sound strategy decision, and the prejudice to the defense was obvious, for it rendered defense counsel completely unable to present a defense.

b. Failure to Subpoena Medical Records. In the 2½ years between Isis' death and Ernie's trial, his counsel did not subpoena the medical records. Defense Record and Trial

41 Like Ernie and other falsely accused caretakers, Ms. Briggs described shaking Daniel after finding him limp, "real blue," and not breathing. As Dr. White points out, such statements do not suggest inappropriate actions; instead they are normal reactions of caretakers who discover that a baby has stopped breathing. *See* White Aff., Ex. 1 at ¶ 6 and Att. A. .

Subpoenas, Exs. 92, 93 (defense subpoenas do not include subpoenas for medical records). Indeed, many of the records needed to conduct a medical review of the evidence are still unavailable. These records include four sets of photographs taken at the hospital and at autopsy,[42] the CT scan taken at the hospital on October 28, the neuropathology report on the brain hemorrhages, and the blocks and slides needed to look for other causes of death. White Aff., Ex.1 at ¶ 29; Squier Aff., Ex. 3 at ¶¶ 35, 56; Pollanen Aff., Ex. 5 at ¶ 63. The failure to subpoena critical records in and of itself constitutes ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (failure to conduct pre-trial discovery).[43]

At trial, moreover, Ernie's defense counsel admitted that he hadn't yet seen the sexual assault photographs that formed the basis for the case:

> King: I will show you what's been marked as State's Exhibits 30 through 49, and ask you to look at each one of those to be able to answer whether you can identify those and whether they accurately reflect what you saw in that sexual assault exam?
>
> Gorday: Yes. These are the photographs that I have taken – that I took.
> . . .
>
> King: We ask these photographs be admitted.
>
> Wilson: I'm not sure I have seen them, but I would like to look at them.
>
> Court: I'll allow you to do that.

RR 5:104. Mr. Wilson's admission that he did not look at the photographs prior to trial in and of itself is sufficient to establish ineffective assistance of counsel. It is not possible to prepare a

42 The District Attorney's suggestion that all photographs were in black and white is not credible. Campos Reports, Ex. 65 at 1. Since the District Attorney has now closed its files to Ernie's counsel in the habeas and capital counsel cases, it is not presently possible to determine the quality of the photos.

43 In this case, the failure to subpoena records fell just short of a total failure to conduct discovery. The court files contain two defense record subpoenas, one in the sexual assault case (a subpoena to CPS and Bobbi Allen, a therapist, issued 3 weeks before trial seeking information on Alex Shelton) and one in the capital case (a subpoena seeking Family Support Services' records on Ernie's visits with his children). Defense Record and Trial Subpoenas, Exs. 92, 93. None of this information was used at trial. While this information does have some relevance, it does not address the key issues in the case, namely the cause of Isis' death and various injuries.

defense in a case based on sexual assault examination photographs without looking at the photographs, let alone obtaining an independent expert review. Even more striking was the fact that this discussion occurred *after* Mr. Wilson had completed his cross-examination of two E.R. nurses, Ms. Fanelli and Ms. O'Neal, both of whom testified on the photographs. *See also* RR 4:190 (following previous discussions, State apparently provided disc of selected photographs, including sexual assault photographs, to Mr. Wilson on first day of trial; indicated that photographs had been previously available for viewing, though presumably not copying, through open file policy); *see also* R. Lopez Aff., Ex. 32 at ¶ 54 (family kept asking Mr. Wilson about sexual assault photographs; Mr. Wilson kept saying he hadn't seen them yet; David Isern said he really needed to get them three or four days before trial).

Since Mr. Wilson was unfamiliar with the photographs, he could not properly address their admissibility, cross-examine or impeach the State's experts, or explain the photographs to the Court or the jury. *See* RR 5:105-116 (voir dire); *see also* RR 5:165-172, 175 (Gorday), RR 6:194-198 (Levy), RR 7:4-5 (opening argument), RR 7:178-188 (closing argument); *see also* Sabian Lopez Aff., Ex. 35 at ¶ 8 (when State showed pictures of Isis' genital areas, Mr. Wilson seemed lost, as if he had never seen the pictures before and didn't know what to make of them; he shuffled papers as if he didn't know what to say or do), ¶ 11 (seemed as if Mr. Wilson hadn't looked at the medical evidence and therefore wasn't able to address it in way that jurors and judge could understand; by closing argument, seemed to be agreeing with the prosecutors that child had serious genital injuries and that Ernie was in the house when it happened; had not understood that Dr. White had said injuries can't be timed in this manner and that there were many other possibilities for the baby's condition). With even a basic knowledge of infant genitalia, however, these photographs are not difficult to understand or particularly painful to

look at (contrary to Mr. Wilson's suggestion in closing argument, RR 7:180): they show no injury to the external genitalia or hymen, a small split-pea size drop of blood on the posterior fourchette (a nonspecific finding), a likely diaper rash, and an increasing amount of blood as Ms. Gorday used Q-tips to "stir up" the area, in violation of every known pediatric sexual assault protocol. Had Mr. Wilson looked at the photographs and familiarized himself with infant anatomy prior to trial, he would doubtlessly have reached the same conclusion as Dr. Soderstrom, Dr. White, the sexual assault literature and, indeed, most of the jurors: these photos do not suggest abuse but rather suggest infection, combined with a bleeding disorder and vigorous sexual assault examination.

Later in the trial, Mr. Wilson also indicated that he hadn't seen a body diagram of Isis' bruises:

> Murphy: We have a diagram that was used at the grand jury where she marked in red the injuries [DeAnn Lopez] noted. She made some red notations. She signed it . . .
>
> Wilson: I'm curious why they didn't offer to give us a copy of this with the grand jury testimony. It was not with the transcript.
>
> Baskett: This has been available in our file to them. It was an exhibit and we put the exhibits in there from the grand jury.
>
> Wilson: I can't argue with him over that, but I don't recall seeing that. . .
>
> Court: Go ahead and take a look at it.

RR 7:32-33. In the subsequent discussion, Mr. Baskett indicates that the diagram was a grand jury exhibit contained in the open file; Ms. King indicates it was prepared by Ms. Gorday; and Mr. Murphy indicates it was prepared at autopsy. It seems likely that Ms. King was right since Mr. Isern's notes from January 2001 suggest that he had seen this diagram at the District Attorney's office. Ex. 82. Whatever its origin, Mr. Wilson did not seem to understand its

significance and asked to have it excluded, to which the judge agreed. *Id.* If this was Ms. Gorday's diagram, however, Mr. Wilson's efforts to keep it out is inexplicable since it confirms that Isis' injuries occurred while in her mother's or grandfather's care, not Ernie's.[44] Since Ms. Gorday's diagram was part of the sexual assault examination report, Mr. Wilson's lack of familiarity with the diagram further indicates that he had never seen this report, even though it formed the basis for the entire trial.

c. Failure to Review Records that Became Available. While Ernie's defense counsel did not subpoena the medical records, some records apparently became available through a subpoena directed to CPS. Specifically, a brown trial folder at the back of Mr. Isern's files contains what appears to be 481 pages of documents relating to Alex and Doug Shelton, provided by CPS on March 25, 2003 (3 weeks before trial). These materials include the medical records that are attached as Exs. 52-55, 57, 59. Had Mr. Wilson reviewed these records, he would have seen the body diagram detailing the brown bruises; severely abnormal laboratory results; pediatrician reports noting *candida* diaper rash and various safety and nutritional concerns; and hospital records indicating that the nurses incorrectly stated the timing and circumstances of the sexual assault examination. These reports alone would have allowed Mr. Wilson to conduct proper cross-examinations of Dr. Vas and the E.R. personnel, all of whom appeared to be claiming – contrary to all available evidence – that Isis merely had a "cold" on Friday (Vas at RR 7:17) and that Ernie was responsible for Isis' condition. Unfortunately, Mr. Wilson did not review these records.

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44 Since defense counsel did not understand the medical significance of particular facts, this pattern of seeking to exclude exculpatory evidence was evident throughout the trial. For example, defense counsel successfully moved to exclude Ernie's statement that he had cleaned sticky stool from Isis' vaginal area when he changed her in the middle of the night, a statement that might explain the small amount of bleeding observed by the emergency room nurses, particularly in view of the child's diaper rash, bleeding disorder and rapid rehydration.

Equally disturbing, it appears that Mr. Wilson did not read or did not understand Dr. White's initial report, which raised numerous issues with the cause and timing of Isis' injuries, including the genital injuries. Thus, when the Court asked Mr. Wilson whether Dr. White had issued any type of report that the Court could review *in camera,* Mr. Wilson advised the Court that Dr. White's report "isn't very informative, because he didn't have enough information at that time." RR 8:9. In fact, Dr. White's report was very informative, for Dr. White advised that: (1) there was no medical or scientific basis for timing the genital injuries to within 2 hours of hospital admission, as suggested by Ms. Gorday; (2) given the complexities of the child's medical condition and the multiplicity of individuals in contact with her in the days prior to death, it was impossible to determine the nature of the child's injuries, when they were inflicted, or who had inflicted them; and (3) Ernie appeared to be excluded as a cause of the child's bruises. White Aff., Ex. 1, Att. A. This report also contradicted Mr. Wilson's statement to the Court at the beginning of trial that he and Mr. Isern had been unable to find an expert to testify on the sexual assault evidence. RR 3:16-17. Since Dr. White is a forensic pathologist – at the time of his preliminary report, he was the Medical Examiner in Corpus Christi – Dr. White's expertise encompasses sexual assault as well as causes of death.

d. Failure to Obtain Expert Review. In this case, the need for expert review of Isis' medical records was obvious. Isis was a sick baby on arrival at the Lopezes, with more than 20 old bruises (attributed by her mother to insect bites) and numerous symptoms, including black stool, fever, lethargy, respiratory problems and failure to eat. Her mother was known for poor judgment and negligent childcare, and refused to obtain medical care for fear of being accused of abuse. Despite these pre-existing problems, the E.R. personnel attributed Isis' condition to sexual assault and shaking occurring shortly before hospital admission. In his preliminary

report, Dr. White indicated that there were many possible causes for the autopsy findings, and that there was no medical or scientific basis for the timing estimates provided by the E.R. personnel. Recent reviews of the medical information that has become available confirm that Isis likely died of complications from infection, illness or injuries occurring prior to arrival at the Lopez home, with secondary bleeding attributable to some combination of infection, a bleeding disorder and hospital treatment.

Since defense counsel did not obtain an independent medical evaluation of the medical records, none of this information was presented at trial. It is well established that the failure to obtain and present medical information at trial in a case involving child sexual assault or child death constitutes ineffective assistance of counsel. *See, e.g., Briggs*, 187 S.W.3d at 470 (granting habeas petition in child death case based on defense counsel's failure to investigate significance of child's medical history, including sepsis, bungled hospital procedure and likely origin of fracture and bruises); *Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir. 2005) (affirming grant of habeas petition in child sexual assault case; counsel's failure to investigate medical evidence and examine photographs prior to trial was constitutionally deficient); *Lindstadt v. Keane,* 239 F.3d 191, 201-202 (2nd Cir. 2001) (habeas petition granted; counsel failed *inter alia* to retain expert to testify or educate counsel on sexual abuse indicia, including lack of correlation between scarring on posterior fourchette and abuse); *Pavel v. Hollins,* 261 F.3d 210, 223 (2nd Cir. 2001) (granting habeas petition on child sexual assault conviction; counsel failed to consult with expert on physical evidence of child sexual abuse and possibility that diarrhea might provide innocent explanation for redness in anal area); *Holsomback v. White,* 133 F.3d 1382, 1388 (11th Cir. 1998) (granting habeas petition in child sexual abuse case based on counsel's failure to obtain medical records and disinterested medical testimony on abuse allegations). *Cf. Williams v.*

Martin, 618 F.2d 1021, 1027 (4th Cir. 1980) (granting habeas petition based on state court's refusal to provide independent forensic pathologist to evaluate cause of death in homicide case).

The failure to obtain a complete expert review of the medical evidence prior to trial is particularly inexplicable in this case since Ernie's parents paid $7,000 for experts in March 2001, with $3,000 earmarked for a forensic review by Dr. White. Of this, defense counsel used $600 for Dr. White's preliminary review. Because they had paid for experts and knew that Dr. White's review was favorable, Ernie and his parents went into trial expecting Dr. White and other experts to testify. Mr. Wilson never did explain to Ernie why his experts did not appear. Ernie Lopez Aff., Ex. 37 at ¶¶ 79-80. After trial, however, Mr. Wilson told Ernie's wife that all of the experts had concluded that Ernie was guilty. D. Lopez Aff., Ex. 29 at ¶ 45 (knew Ernie's parents had paid great deal of money for experts to review the records; when she asked when experts were going to testify, Mr. Wilson told her that all Ernie's experts had "bailed" because after reviewing the materials they believed he was guilty and that the time frame showed he did it). In contrast, he told Ernie's parents that Dr. Johnson had to leave because she had another trial in Seattle and that the other experts had "backed out." R. Lopez Aff., Ex. 32 at ¶ 55 (went to trial expecting several experts to testify, including Dr. White, a nurse examiner from Dallas and a DNA expert; Mr. Wilson said DNA expert left because prosecutors took so long that she had to leave to testify in another case; when we asked, Mr. Wilson told us other experts had backed out). In fact, Dr. Johnson left because the State's witnesses had agreed that the DNA was consistent with childcare, not sexual assault; Dr. White did not appear because Mr. Wilson did not ask him to testify in the guilt/innocence phase, did not provide him with the medical records, and forgot to call him for the punishment phase; and Professor Jenkins did not appear because Mr. Wilson did not name her as a witness until the first day of trial, at which point the Court

ruled against a late designation. *See* White Aff., Ex. 1 at ¶¶ 10-14; Johnson Aff., Ex. 6 at ¶ 16; RR 3:20 (unfair to State to allow Jenkins to testify; can use as consultant); Jenkins Proffer, Ex. 7 at ¶¶ 2-3, 19.

e. Failure to Familiarize Themselves with Medical literature. Even if Ernie's defense counsel had been unable to obtain an expert, as Mr. Wilson claimed, they would still have been required to obtain the medical records and familiarize themselves with the medical literature. *Lindstadt*, 239 F.3d at 201-202 (granting habeas petition on child sexual assault conviction based, *inter alia*, on counsel's failure to acquaint himself with the medical literature). In *Lindstadt,* the Court characterized trial counsel's failure to request the study on which the State's medical expert on sexual assault relied as "an amazing dereliction" of duty and found defense counsel ineffective for failing to contact an expert to testify or educate counsel on abuse indicia. *Id.* at 201 (indicating that "it is difficult to imagine a child abuse case in which the defense would not be aided by the assistance of an expert," quoting Child Abuse Primer). In *Lindstadt,* "[s]uch an expert could have brought to light a contemporaneous study, accepted for publication at the time of Lindstadt's trial, that found similar irregularities on the hymens of girls who were *not* abused." *Id.* at 201-202 (citing McCann and Muram articles, among others, and pointing out that Lindstadt's *appellate* counsel had been able to locate these studies). In 2003, when Ernie's case came to trial, it was even easier to locate the relevant literature, since by then the McCann and Muram articles had not only been referenced in the case law but incorporated into the SANE protocols and every reliable medical textbook. *See, e.g.,* Exs. 114, 123, 125.

Because Mr. Wilson did not familiarize himself with the literature or the facts, his cross-examination of the nurses and Dr. Levy did more harm than good. As indicated, in his cross-examination of Ms. Fanelli, Mr. Wilson endorsed her expertise, essentially telling the jury that

they did not have sufficient expertise to disagree with her. Similarly, when he cross-examined Ms. Gorday, he asked about impact of urine and feces on the "injuries" – seemingly assuming that these *were* injuries. RR 5:171. When Ms. King followed up by asking whether Ms. Gorday had learned of any platelet or hemophiliac conditions of the child, Ms. Gorday responded that she didn't know anything about the child's medical past or medical history. RR 5:172. Since he hadn't reviewed the medical records, Mr. Wilson was unable to point out that in fact the child had a severe bleeding disorder at the time of the sexual assault examination, leaving the jurors with the impression that there were no bleeding abnormalities. Similarly, in cross-examining Dr. Levy, Mr. Wilson asked about cleaning feces from a child, but was unable to respond when Dr. Levy testified on re-direct that "you have a layer of curtains which close off that vaginal vault when the architecture, when the tissues are intact . . . And, again, fluid's going to go down. And so if you have feces or urine, it goes down, not back up. And it will leak out of a diaper, or will go somewhere else before it reenters the vaginal vault." In fact, of course, there is no "layer of curtains" on an infant; instead, the posterior fourchette is directly behind the labia majora and it is subject to the intrusion of feces and infection. Without such knowledge, every question that Mr. Wilson asked backfired. Since he was not familiar with the child's laboratory reports (which confirmed infection and a bleeding disorder) or the medical literature (which confirmed that bleeding on the posterior fourchette is a nonspecific finding that can be caused by inflammation or the sexual assault examination), no cross examination at all would have been preferable since, as it was, every question simply provided the State's experts additional opportunities to preclude alternative diagnoses and misinform the jury. *See Lindstadt*, 239 F.3d at 202 (since counsel was not familiar with the literature, cross-examination was ruinous; state expert simply testified that unidentified studies ruled out every theory of innocent injury suggested by defense counsel).

f. Failure to Investigate Facts. Effective assistance of counsel also requires familiarity with the facts. *See, e.g., Briggs*, 187 S.W.3d at 469 (cannot make strategic decisions without full investigation of facts and law); *Smith v. State,* 894 S.W.2d 876 (Tex. App.—Amarillo 1995, writ ref'd) (to render effective assistance, counsel must have firm command of facts of case); *Williams v .Washington,* 59 F.3d 673, 679-682 (7th Cir. 1995) (granting habeas petition in child sexual assault case given failure to investigate facts). Ernie's lead counsel was, however, unfamiliar with the facts, and often seemed to get them confused. So far as we can determine, Mr. Wilson did not interview any potential witnesses and did not prepare the witnesses that he did call. *See* Ernie Lopez Aff., Ex. 37 at ¶¶ 74-77, 80 (met with Mr. Wilson for total of one hour; no trial preparation or discussion of facts or issues); D. Lopez Aff., Ex. 29 at ¶ 44 (does not recall talking to Mr. Wilson before the trial; if she did, it was in a group and very brief; did not speak to Mr. Wilson separately); M. Guerrero Aff., Ex. 30 at ¶ 20 (didn't meet with Ernie's lawyers other than for few minutes outside courtroom; did not see earlier statements or have opportunity to refresh her memory; was surprised Ernie's attorney did not ask her very much about Isis' physical condition; DeAnn told her later that the lawyers said that Isis' bruises, sores and illness had nothing to do with the case); *see also* Isern Billing Records, Ex. 96 (Isern time records show no witness meetings). Since Mr. Wilson had forgotten to call his experts, Ernie, Deann and Mary were *the only* witnesses that Mr. Wilson planned to call (apart from Dr. Vas, who was a hostile witness) – yet, even so, he did not take the time to determine what they knew or prepare them for trial. Having failed to interview witnesses, learn the facts, or review the records, it is not surprising that Mr. Wilson was unable to effectively cross-examine Dr. Levy (who remained under the misimpression throughout the trial that Ernie caused the initial bruises) or Dr. McClain (who remained under a similar misapprehension that the facial markings

observed at autopsy were new bruises, occurring within 24 hours of death). *See* Sabian Lopez Aff., Ex. 35 at ¶ 10 (at trial, Mr. Wilson didn't seem to know much about the case; when we asked why he wasn't raising the fact that the baby was bruised when Dr. Vas brought her to DeAnn, Mr. Wilson always said it wasn't relevant or he wasn't allowed to introduce it).

Mr. Wilson also apparently intended to base his defense on a complete misunderstanding of the facts. He seemed to be under the misapprehension that Alex, Isis' older brother, had claimed that he was sexually abused by Mr. Vas, Dr. Vas' father, a few days before Isis' death. RR 7:18-21. Even a cursory review of the materials provided by CPS – and that Mr. Wilson seemingly intended to use to suggest that Dr. Vas' father had sexually assaulted Isis – would have revealed that Alex' outcry was in 2002, not 2000. When Mr. Wilson learned of his error during his attempted examination of Dr. Vas, the court excluded this evidence because it was "remote in time," with Mr. Wilson's apparent agreement. RR 7:21. The difference in time did not, however, necessarily diminish its relevance, for if one believes that Isis was sexually abused, Alex' outcry against his grandfather would suggest that it was Mr. Vas, who was caring for Isis until she was brought to the Lopezes, who abused her.[45] This mistake also illustrates the fatal flaw in Mr. Wilson's approach: because he had not familiarized himself with the sexual abuse literature or spoken to Dr. White, Mr. Wilson appeared to be operating under the misapprehension that Isis had indeed been sexually assaulted. Before trial, Mr. Wilson told Rosa Lopez, Ernie's mother, that "he wasn't used to defending innocent people" and that what he did was get good plea bargains. R. Lopez Aff., Ex. 32 at ¶ 48 (Mr. Wilson's wife and secretary told Lopezes that Mr. Wilson did not prepare for trial until a week before trial). By then, however, it

45 Mr. Wilson's emphasis on Alex' outcry also suggests that defense counsel were exploring tangential information rather than focusing on the critical elements of the case, namely, the medical evidence. *See Winn v. State*, 871 S.W.2d 756, 761 (Tex. App.—Corpus Christi 1993, no writ) (conviction overturned based on ineffective assistance of counsel; difficult to see how getting evidence of witness' suicidal tendencies from tangential witness would be more important than attempting to secure favorable expert testimony regarding the physical evidence).

is too late to effectively defend any client, particularly an innocent client accused of sexually assaulting and murdering a child, for it is not possible to subpoena medical records, familiarize oneself with the medical literature, interview and prepare witnesses, and retain experts starting just a week before trial.

Mr. Wilson's lack of familiarity with the facts also rendered him unable to address facts that became available during trial. For example, the State argued that the presence of the child's DNA as well as the DNA of an unidentified male on the "inside" of Ernie's underwear had some type of sexual implication. Mr. Wilson did not point out that there is a much more likely explanation. Specifically, Officer Fewell testified he had placed all of Ernie's clothing in one large paper bag, where it remained for 7½ months before being transferred to separate bags by Sgt. Burgess.[46] Thus, there was ample opportunity for the deposit of DNA by at least two police officers as well as transfer of DNA between clothing items during storage and transfer. Ironically, the State was well aware of this major flaw in their DNA argument, for in opening argument, Ms. King prepared the jury for this problem:

> I believe the evidence and the testimony will show that Ernest Lopez was arrested and booked into the Potter County jail. That an officer collected his clothes as of procedure, and put them all in one bag to be booked into Amarillo Police Department. I believe you will hear that the better procedure of that would have been for each one of those items of clothing to be bagged separately. In any case, the clothes were sent to a crime lab. . .
>
> After hearing the expert evidence and testimony, I believe it's you that gets to decide how important that is, and what it means to your findings I believe the evidence will show that cellular material – human cellular material of Ernest Lopez, Isis Vas. And a third and unknown person was identified, inside Ernest Lopez undershorts. You also get to decide how important that is, and what it means to you and your decision.

46 There is no record of whether Ernie's underwear was inside out or right side out when he removed it, or whether it was placed in the bag inside out or right side out.

RR 4:12-13. Ms. King need not have worried, however, for Mr. Wilson was not sufficiently familiar with the facts to point out any of these issues. Mr. Wilson similarly did not point out the significance of the testimony of the State experts on the need to clean stool from the genital area to prevent infection which, along with DeAnn and Ernie's testimony on cleaning stool from this area, clearly required a medical care defense instruction. Nor did he seem to understand the significance of Dr. Levy's testimony on dehydration, which, when combined with DeAnn's testimony on Isis' failure to eat, provided an obvious alternative cause of death.

g. Prejudice. Since this case was based entirely on medical evidence, defense counsel's failure to understand the facts and medical evidence cannot be justified as a strategic decision. Since it was a medical case, it required a medical defense. The failure to prepare such a defense caused serious prejudice, which is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is further defined as "*a probability sufficient to undermine confidence in the outcome*." *Id.* (emphasis added). In making this determination, the court must determine whether the errors had significant impact, or only an isolated or trivial effect, on the evidentiary picture. *Id* at 695-96. In making this determination, a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Id.* at 696.

Since this case was based entirely on medical evidence, the failure to investigate the medical issues impacted *all* of the evidence and prejudiced every stage of the proceedings. There wasn't any other evidence suggesting that Ernie injured Isis – the sexual assault examination was negative, the DNA was characteristic of caretaking rather than abuse, Ernie's psychological examination and parenting evaluations were excellent, there was no blood on the

child, and there was nothing to suggest that his house had been the scene of a rape and murder. *See Shaw v. Collins*, 5 F.3d 128, 132-133 (5th Cir. 1993) (granting habeas in child sexual assault case given constitutional error and weakness of evidence, specifically, lack of hymenal ring did not support guilt, rape kit test did not contain sperm or seminal fluid, and there was no absence of heavy bleeding or blood at the house; sexual assault of five-year-old girl by grown man would be expected to cause trauma, bruising and heavy bleeding). By failing to investigate or familiarize themselves with the facts or the medical issues, Ernie's defense counsel did not defend him but instead deprived him of all possible defenses.

(i) Pre-trial. The failure to investigate and understand the medical evidence permeated the pre-trial proceedings. In January 2003, Mr. Isern objected to the separation of the sexual assault and capital murder charges on the ground that this would allow the State a "dry run" on the capital murder charges. However, this missed the broader point: it would not be possible to defend the sexual assault case without understanding the medical evidence on Isis' medical condition, hospital treatment and death. The State, however, understood both that the cases were inextricably intertwined *and* that it was essential to keep them separate, for any reasonable jury that looked at Isis' overall medical condition would likely realize that her injuries were not caused by Ernie. *See, e.g.,* RR 2:169 (State describes facts as "inextricably intertwined;" agrees almost impossible to totally separate the two). As a forensic pathologist, Dr. White also saw the connection immediately. White Aff., Ex. 1, Att. A. While the Court called for briefing on the separation of charges, there is no evidence in the record that defense counsel prepared the requested briefing. Ex. 99. Indeed, when defense counsel later requested an expert on the cause of Isis' death and injuries, they did not request Dr. White but instead requested Dr. Elizabeth Johnson, a DNA expert. Ex. 103. Since Isis' death had nothing to do with DNA, Dr. Johnson –

who is not a medical doctor – could not possibly address the cause of Isis' injuries and death. Because she cannot address these issues, Dr. Johnson had already told defense counsel that they needed a forensic pathologist, and had made a personal recommendation. *Id.* Despite having hired the wrong expert to address Isis' injuries, Ernie's counsel told the trial court at the March 31 pretrial hearing that they hadn't anticipated needing to designate Dr. White because "he really doesn't have anything to do so much with the sexual assault case." RR 2:168. Just as Ernie's defense counsel's lack of familiarity with the facts rendered them unable to select an appropriate expert, defense counsel's lack of familiarity with the medical issues also rendered them unable to voir dire the State's experts, which in turn allowed the introduction of unsubstantiated and incorrect medical testimony (discussed below).

(ii) Guilt/innocence phase. Despite naming Dr. White as a witness, Ernie's counsel told the Court at the beginning of the guilt/innocence phase that they could not find an expert on sexual assault. RR 3:16-17. As indicated, this was incorrect: Dr. White had already addressed the sexual assault issues, including timing. On Easter Sunday, the day before Mr. Wilson was to put on Ernie's defense, moreover, Mr. Wilson told Ernie that they would be presenting his experts the next day. In fact, Mr. Wilson had no experts. The failure to keep Ernie informed on the status of the case – including defense counsel's failure to retain experts – violated trial counsel's fundamental duty to his client. *Strickland*, 466 U.S. at 688. Since Ernie and his family were expecting to hear from the experts, they were startled on Monday when, instead of presenting experts, Mr. Wilson told the jury that they would be hearing from Dr. Vas, Ernie and DeAnn's sister. *See* Sabian Lopez Aff., Ex. 35 at ¶ 6 (my parents paid $7,000 for experts to review medical records; this was a real hardship for them, but Ernie's attorneys had told them it was very important to have outside experts review the medical evidence; we went to trial

expecting several experts to testify for Ernie; however, no experts testified for him; the DNA expert helped prepare questions but didn't testify; other experts didn't show up at all; Mr. Wilson said one wouldn't testify because he had taken a job in Amarillo); D. Lopez Aff., Ex. 29 at ¶ 45 (knew Ernie's parents paid great deal of money for experts to review records; understood these experts, including Dr. White, were going to testify; also understood Ernie's attorneys had hired other experts from Dallas and California; when I asked when experts were going to testify, Mr. Wilson told me that all of Ernie's experts had "bailed" because after reviewing the materials they believed he was guilty and that the time frame showed he did it); R. Lopez Aff., Ex. 32 at ¶ 55 (went to trial expecting several experts to testify for Ernie); Ernie Lopez Aff., Ex. 37 at ¶ 80 (understood that Dr. White would testify on Easter Monday, first day of defense on guilt/innocence; never showed up; never did understand what happened).

Without experts (or even a theory), Mr. Wilson merely said in his opening argument that he hoped they would be able to keep the jury's attention but that "[w]e don't plan on spending any more time than we have to." RR 7:5. In this, he seriously misjudged the jury: while Mr. Wilson may not have been interested in the medical evidence or explanations other than sexual assault, the jury most certainly was interested for, unlike Mr. Wilson, they realized that the State's theory did not fit the facts. *See, e.g.,* Juror Affidavits, Exs. 15-17. By failing to prepare experts or himself, he betrayed his client and failed to provide the jury with the information they needed to make a reasoned decision.

The failure of Ernie's counsel to present evidence on the timing of hemorrhages was particularly disastrous. At trial, the E.R. personnel "timed" the vaginal and brain hemorrhages to within an hour of hospital admission. Dr. White had already told Ernie's defense counsel, however, that it is not medically or scientifically possible to time hemorrhages in this manner.

White Aff., Ex. 1, Att. A. *See also* Pollanen Aff., Ex. 5 at ¶ 51 (not possible to distinguish between injuries occurring shortly before hospital admission and injuries occurring shortly after hospital admission). Had Mr. Wilson familiarized himself with the literature, it would have been apparent that Ms. Gorday and Dr. Levy were operating outside the bounds of modern medicine, as well as their own areas of expertise. *Id.* at ¶ 47 (Nurse Gorday and Dr. Levy do not appear to understand the subtleties involved in the forensic pathology of the timing of injury; indeed, neither is a forensic pathologist); White Aff., Ex. 1 at ¶ 77 (testimony of nurse and E.R. physician that bleeding can be attributed to 40 minute period prior to hospital admission is not supported by the medical literature or the medical records; brain and retinal hemorrhages characteristic of injuries that could have been present for hours or days prior to hospital admission; bleeding may also have been caused or aggravated by post-admission treatment).

Defense counsel's failure to obtain medical evidence on the timing issue had a disastrous secondary consequence. If the Court had been advised that the injuries could not be timed in the manner suggested by the E.R. personnel, a wide range of evidence would have become relevant to the child's injuries and death, including comprehensive information on the caretaking skills of Dr. Vas, Ernie and Dr. Vas' father. As Dr. White suggested in his preliminary report, this evidence suggests a wide range of causes for Isis' injuries and death. Correcting the timing evidence would have opened the case up to all the evidence that the State was trying so hard to exclude – indeed, that they almost certainly had to exclude to obtain a conviction. As set forth in the facts, many witnesses had relevant evidence on these points. *See Pavel* 261 F.3d at 219-22 (failure to investigate or obtain testimony on surrounding facts constituted ineffective assistance of counsel).

(iii) Punishment phase. By the punishment phase, the failure to obtain the medical records or retain an expert was even more devastating. Mr. Wilson told the Court that he had not prepared for this phase because the State had not told him whether they had definitely decided to introduce evidence on the death. RR 8:6. Ernie's counsel therefore did not attempt to locate Dr. White until the first day of the punishment phase.[47] Counsel's somewhat forlorn hope that the State would decide not to introduce evidence of the child's death at the punishment phase does not in any event justify his failure to prepare, particularly since the State had given ample notice of its intent to introduce the death as an extraneous offense. State's Notice of Intent to Introduce Extraneous Offenses, Ex. 101 (January 2003); RR 2:168-170 (March 31 Pre-trial Hearing); (Wilson assumed State would go into death at punishment phase; Court agreed that this was "fair game;" State indicated that it would be unlikely that they could hide child's death from the jury even in guilt/innocence and that it was "almost impossible" to separate the two cases). *See also Pavel*, 261 F.3d at 218 (counsel's failure to prepare defense that he felt might ultimately prove unnecessary constituted ineffective assistance of counsel; desire to avoid work is not a strategic decision but a lack of diligence); *Loyd v. Whitley*, 977 F.2d 149, 158 and n.22 (5th Cir. 1992) (distinguishing between "strategic judgment calls" and "plain omissions").

Defense counsel also suggested that he had not brought Dr. White to Amarillo earlier to save the County money. RR 8:14. This further violated his duty of undivided loyalty to his client. *Strickland*, 466 U.S. at 688 (duty of loyalty is basic duty of counsel); *Pavel*, 261 F.3d at 219 (while there are many ways to assist a client, making important decisions with no regard for

47 So far as we can determine, Mr. Wilson's suggestion that Dr. White might testify unfavorably because of possible employment opportunities in Amarillo was simply an effort to shift the blame for Mr. Wilson's failure to subpoena the records or have Dr. White review them. If Mr. Wilson wanted to know what Dr. White would say, he had merely to ask him. *See Holsomback*, 133 F.3d at 1388 (having failed to investigate, trial counsel could not make an informed tactical decision that the risk that doctors might equivocate on the stand outweighed the potential benefit from their testimony).

the client's interests is not one of them). As is clear from Dr. White's preliminary report and affidavit, Dr. White's advice was needed at *all* stages of the proceedings, including the (non-existent) voir dire of the E.R. personnel.

In other respects, the punishment phase of the trial followed the same pattern as the first. Ernie's defense counsel did not review the medical records or familiarize themselves with the literature, nor did they mention the alternative cause of death that was already in the record: dehydration, as established by DeAnn Lopez's testimony and Dr. Levy's testimony (extracted by the State, rather than Ernie's defense counsel). RR 4:166 (DeAnn); RR 6:189 (Levy). Ernie's defense counsel also appeared to have forgotten about the pre-existing bruises, which had never been explained. *See* C. Lopez Aff., Ex. 34 at ¶ 13 (couldn't understand why no one explained the baby's bruises); Shannon Lopez Aff., Ex. 33 at ¶ 17 (closing arguments were frustrating; old bruises never explained). Without any understanding of the medical issues, Mr. Wilson simply gave up and threw his client on the mercy of the jury, saying: "We simply ask you to not judge Ernest Lopez on the worst part of his life. Judge him on the whole of his life. And when you do, I think that you will find, in your heart some amount of compassion." This was not a defense: it was a complete surrender.

3. <u>General Lack of Preparation.</u> The failure to review the medical evidence was indicative of a larger problem: Ernie's counsel did not spend any time preparing for trial. The court records indicate that Mr. Wilson's work for Ernie included one full motion day (March 31) and six full trial days (April 14-17 and 21-22). RR Vols. 2-8; *see also* Ex. 96 (Isern billing records). Since he was paid only $5,100 in total, it is likely that he did little if any out-of-court preparation. Indeed, as best we can determine, Mr. Wilson met only twice with his client, each time very briefly. In the first meeting, 3 days before trial, Mr. Wilson and Mr. Isern presented

Ernie with a 45-year plea bargain. In the second meeting, in the midst of trial, Mr. Wilson told Ernie (incorrectly) that he would be presenting experts the following day. Ernie Lopez Aff., Ex. 37 at ¶ 80. Mr. Wilson did not, so far as we can determine, speak with any other witnesses or conduct any other pre-trial investigation.[48] *Smith v. State,* 894 S.W.2d 876, 880 (Tex. App.--Amarillo 1995, writ ref'd) (ineffective assistance where counsel spent some 7 minutes interviewing client, and failed to interview witnesses or investigate properly).

Mr. Isern's billing forms indicate that he spent 85-100 hours over the course of 2½ years on pre-trial preparation. As this suggests, Mr. Isern, who joined the Bar less than a year before taking Ernie's case, had a working knowledge of the facts, though not of the medical issues. After obtaining Dr. White's preliminary review of the sexual assault evidence in April 2001, however, Mr. Isern appears to have dropped all consideration of the medical evidence until trial, when Mr. Campos, the investigator, attempted a last-minute effort to help defense counsel obtain an expert. At trial, Mr. Isern's knowledge of the facts was not particularly helpful since his role in the trial was very limited and most of the relevant information had been precluded by a motion in limine that was apparently never signed by the Court but that all parties appeared to agree precluded evidence on Dr. Vas' negligence. RR 3:6-8. Thus, Mr. Isern's only role was to conduct DeAnn's cross-examination, in which he obtained good information on Isis' symptoms in the days before her death, including black stool, failure to eat, bruising and lethargy. However, Mr. Wilson conducted the rest of the trial, rejecting Mr. Isern's suggestions as well as those by Ernie's family. Indeed, it appears that Mr. Wilson viewed suggestions by those who knew the facts as a nuisance:

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48 Mr. Wilson's decision to rely exclusively on family and friends for punishment phase witnesses also suggests a lack of familiarity with the facts. In general, independent witnesses, such as Dr. Basham and Ms. Martin, who would have provided outside corroboration of Ernie's psychological soundness and parenting skills, are more credible. These witnesses should also have been used at the guilt/innocence stage since Ernie clearly did not fit any of the profiles of a sex offender. *See, e.g.,* Ex. 10(e).

> During the trial, David Isern and the family made many suggestions to Mr. Wilson. None of us could figure out why no one was pointing out that the baby was bruised and/or bitten while in her mother's and grandfather's care. No matter what anyone said, Mr. Wilson overrode them because he was the lead. It was my impression that Mr. Wilson didn't know much about the case or when different things had happened, and that he wasn't willing to listen to anyone who did, including Mr. Isern. It was my understanding that Mr. Wilson didn't look at the case until a week or less before trial.
>
> When we talked to Mr. Wilson, he didn't want to discuss the evidence and seemed to be trying to pretend that the injuries weren't there. When we asked him about this, he said that the injuries were irrelevant and that he didn't want to point fingers or open up a bag of worms. Again, this seemed odd since the picture showed bleeding, and it seemed that Mr. Wilson needed to address it.

Aff. of Eddie Lopez, Ex. 36 at ¶ 15, 19; s*ee also* Ernie Lopez Aff., Ex. 37 at ¶ 81 (Mr. Wilson later told him he had subpoenaed Ernie's parents to avoid annoying questions).

4. <u>Failure to Object</u>. Since Mr. Wilson was not familiar with the facts or the medical literature, he did not object to prejudicial evidence or improper statements by the prosecution – or, when he did object, he did not make the reasons for his objection sufficiently clear for the Court to make a proper ruling. Thus, Mr. Wilson failed to object, among other things, to the prosecutor's discussion of the reasonable doubt instruction; the prosecutor's instructions that the jury should defer to experts; the introduction of unsupported and incorrect expert testimony on the cause and timing of the hemorrhages and shaken baby syndrome; the use of a 4' by 6' screen to show genital injuries; the prosecution's improper summation of the evidence; and improper expression of personal belief in closing argument. Since each of these points violates other constitutional rights, they are discussed separately. Because defense counsel's lack of familiarity with the facts and medical evidence permeated the entire trial, we do not identify each of the errors but rather discuss them in broad groupings, with examples.

5. <u>Inadequate Jury Voir Dire.</u> It is not presently possible to determine whether and how Mr. Wilson and the State exercised their strikes. However, it is obvious that all or

virtually all Hispanics were excluded from the jury, and there is no indication in the record that Mr. Wilson attempted to rehabilitate jurors who may have known Ernie, had some predisposition to question sexual assault evidence, or did not automatically agree that they would be willing to impose the maximum (99) year sentence for what most panel members believed was statutory rape. The State, on the other hand, was so aggressive that one member of the jury complained:

Venireperson:	When you say stuff like that
State:	Yes, ma'am.
Venireperson:	That makes me feel like that you know enough to make me pass a judgment on him that he is guilty.
State:	But people, I'm not the evidence.
Venireperson:	I know. You are a lawyer. But that's what I'm saying. That is what's influencing me.

RR 3:152-154. This did not, however, stop the State from continuing to argue that anyone who wasn't willing to impose a 99-year sentence was "for" pedophilia, a position to which Mr. Wilson did object:

Venireperson:	I don't want to be unfair either way because I don't know the facts.
State:	*My question is, are you for this crime?* The answer is, if everybody says if it's proven a certain way I'll be harsh and that's unfair I can't get a jury. *And if I do get a jury, it is for the people that are for the crime. . . .* . . .
State:	. . . Does everyone see what I mean? *If you want to leave nobody but – but pedophiles in a jury, well then, everybody that would be harsh if certain facts came up.*
Wilson:	Judge I object to that. That's clearly improper and he is going way above and beyond making his point.
Court:	To the extent I think it's been covered. I'll sustain it.

RR 3:154-155 (emphasis added). It does not seem likely, however, that this ruling cured the problem since some panel members may have been disqualified (or disqualified themselves) based on their reluctance to impose 99-year sentences for statutory rape.[49]

Even more critical was defense counsel's willingness to conduct a voir dire in which the jurors were not questioned on their ability to be fair in a case involving the alleged rape and murder of a six month old baby, or on their knowledge of this case, which was sensational and widely publicized throughout the area. *See* Amarillo Globe Newspaper Articles, Ex. 81; R. Hand Aff., Ex. 27 at ¶¶ 15, 17; Looney Aff., Ex. 26 at ¶ 17. The State acknowledged that it was important for the jurors to be able to be fair:

> Because I want you to feel comfortable too. Let me tell you, if you take that jury box and then you decide my God, I can't be fair because – too late. And you swear an oath, it's too late. I can't help you. Judge can't help you. None of us can help you.

RR 3:70. Although Mr. Wilson seemed unaware of the possible impact of pre-trial publicity, he did realize that the failure to voir dire on the age of the child created a problem:

> Judge, being mindful of the Court's prior ruling on an in-limine matter, we are going to ask the Court's permission to inquire of the jury their – the effect on whether they will be able to be fair if they know the victim is a small child. Reason to do that is twofold, with both reasons overlapping. First of all, there is no question that – from the context – content and responses of the State's voir dire of the panel, that there was almost a universal assumption that this involved 11, 12, 13 – 14 year-old. All discussion went toward that . . .
>
> *If the first time they find out that child is under a year-old is when they are in the box* and they start hearing witnesses and we have four or five of them, *they are going it's over right now. He is guilty. Then that's – that's not right.*

RR 3:165-167 (emphasis added) (pointing out that some jurors had already indicated that the age of the child would make a difference). Mr. Wilson suggested that they tell the jury that they believe the evidence will show this was a very small child and ask whether they could follow the

[49] We do not have the information necessary to determine how the jury was selected.

presumption of innocence and hold the State to its burden under those conditions. *Id.* At the March hearing, even the State had agreed that the defense would probably want to advise a jury to soften the blow and let them know at voir dire that the baby did die. RR 2:170. The Court indicated that while some of the panel's comments concerned him, he felt that Mr. Wilson should merely ask whether the child's age would make a difference, without saying how old the child might be. RR 3:168. Despite its earlier position, the State objected to even this limited questioning, seemingly out of concern that it would allow Mr. Wilson to strike jurors who could not deal with the issue of infant rape. *Id.* Ultimately, the Court concluded that the jurors should not be "tie[d] down to a specific fact situation," to which Mr. Wilson agreed. RR 3:171.

As a practical matter, this had two implications. First, it meant that some of the jurors who remained on the panel may not have been emotionally able to handle an infant rape and murder case. Second, it precluded any determination of whether some of the jurors might have heard of this specific case or formed their own opinions on it. In fact, it appears that some of the jurors were caught by surprise when the State indicated in its opening argument that this case involved the rape of a six month old infant while others may have made up their minds before the trial began based on pre-trial publicity, secondhand knowledge or rumor. It appears, moreover, that one juror was influenced by outside sources:

> At the beginning of the deliberations, some jurors had already made up their minds, and it seemed clear that one juror had made up his mind before the trial started. This juror, and possibly other jurors, seemed to have information or explanations in addition to what I had. This information seemed to be over and above any information that they may have obtained from television or newspaper accounts of the case.
>
> I remember particularly an older man who worked for Cal Farley's Boys Ranch. When I was raising my concerns with the evidence, he said something like, "we don't even need this trial, I <u>know</u> this happened." His explanation for the inconsistencies in the evidence was essentially, "look, I <u>know</u> this, and this is what happened." My understanding was that he had a credible outside source and

> that whatever he had been told was sufficient to completely convince him of Mr. Lopez' guilt.
> . . .
> After the initial deliberations on guilt/innocence, it seemed clear that this was going to be a hung jury . . . It is my understanding that the judge told us we had to decide either guilty or not guilty and that a hung jury was not an option . . .
>
> At that point, we had a dilemma. The juror from Cal Farley's Boys Ranch was adamant that he would vote "guilty" no matter how long we discussed the issues. He was beyond reason on this point. He said that he knew Mr. Lopez was guilty, that he knew it from outside sources, and that he didn't care how long it took. He did not disclose his sources, and I didn't ask him. Given his position, it was clear that we could not reach a "not guilty" verdict and that, without the option of a hung jury, we would simply stay in the jury room forever unless we agreed with him.

Gover Aff., Ex. 16 at ¶¶ 21-22, 24-25; *see also* Butler Aff., Ex. 17 at ¶¶ 20-21 (juror from Cal Farley's Ranch had more information about the case than I did; I do not know where he got his information); R. Hand Aff., Ex. 27 at ¶¶ 15-17 (lots of publicity and rumors about case in Amarillo; many people had minds made up based on gossip or publicity). *See U.S. v. Beckner,* 69 F. 3d 1290, 1292-94 (5th Cir. 1995) (conviction reversed since pre-trial publicity raised significant possibility of prejudice and voir dire procedure failed to provide reasonable assurance that prejudice would be discovered if present).

6. <u>Failure of Representation.</u> The record suggests that Ernie may have lacked representation entirely during the critical pre-trial period. The records indicate the following time line:

October 29, 2000	Isern agrees to represent Ernie on felony injury to a child charges for $5,000, with $1,800 up front and remainder to be paid over time.
March 30, 2001	Lopezes have paid total of $10,000 ($3,000 for legal fees and $7,000 for experts). Isern indicates that he will need $30-75,000 if case becomes murder case.

October 5, 2001	Wilson appointed to capital murder case following indictments for aggravated sexual assault and capital murder and proof of indigency.
February 22, 2002	Joe Mann withdraws from appointment as 2nd chair on capital murder case since he has not heard from Wilson or Isern.
September 25, 2002	Isern asks Ernie for additional $25,000 on sexual assault and capital murder cases.
December 11, 2002	Isern files first motion re-appointment of expert.
December 24, 2002	Isern asks Ernie's parents for additional $5,000 on sexual assault case by February 10; does not need additional funds for capital murder case since State has appointed him on that case.
February 2002	**Discovery motions filed by Isern alone.**
March 28, 2003	Court appoints Wilson to aggravated sexual assault case 3 days before pre-trial hearing and 17 days before trial.
April 14, 2003	Trial begins.
April 17, 2003	Court appoints Isern to aggravated sexual assault case at close of State's case, effective April 14 (the first day of trial).

Defense Counsel Contract/Correspondence, Ex. 91; Orders Appointing Counsel, Ex. 94. Ernie understood, however, that Mr. Wilson and Mr. Isern were appointed to the aggravated sexual assault case as well as the capital murder case in October 2001, immediately after the indictments. By then, Ernie was indigent, and his parents had used up their resources for expert fees, bail and legal fees. Thus, when Mr. Isern began asking for more money in 2002, Ernie reminded him that he was court-appointed. Mr. Isern agreed and did not ask for additional funds. Defense Counsel Contract/Correspondence, Ex. 91 (request for additional funds); Ernie Lopez Aff., Ex. 37 at ¶¶ 72-73.

What this suggests is that Ernie may not have been effectively represented by anyone during the critical pre-trial period. Mr. Isern was not being paid and was not court-appointed, and Mr. Wilson had not been appointed to the sexual assault case at all. The court records confirm, moreover, that relatively little happened between December 2002 and March 2003. Indeed, the Court files suggest that the Court did not even rule on the discovery motions filed by Mr. Isern in December 2002. Defendant's Pre-trial Motions, Ex. 97. While Mr. Isern did ask for the appointment of a DNA expert, he did not follow her recommendation to retain a forensic pathologist, nor did he subpoena the medical records, contact Dr. White,[50] or respond to the Court's request for briefing on the bifurcation of the trial. Johnson Appointment, Ex. 103; Defense Record and Trial Subpoenas, Exs. 92-93. As this suggests, during the most critical period in the case – the period in which defense counsel would normally finalize arrangements with experts, interview fact witnesses, and generally make certain that they had a thorough understanding of the facts, the time line and the expert testimony – Ernie was most likely represented by no one at all.

7. <u>Cumulative Prejudice.</u> In determining prejudice, the test is whether counsel's errors are "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In assessing counsel's effectiveness, the Court cannot isolate or separate out one portion of counsel's performance. *See Welborn,* 785 S.W.2d at 393. Instead, counsel's performance as a whole may compel a finding of ineffective assistance of counsel even if no one instance alone meets the standards. *Id*. In determining whether Ernie's defense was prejudiced by the deficiencies of counsel, the deficiencies identified above must be added to defense counsel's failure to obtain the medical records and an expert review of those records – critical failures in a

50 A handwritten notation with Dr. White's earlier telephone numbers suggests that Mr. Isern may have begun to contact Dr. White. However, his log indicates that he did not reach him. Defense Communications, Ex. 90.

case that rested entirely on medical testimony. The need to show prejudice is, moreover, reduced under certain circumstances. For example, actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. *Strickland*, 466 U.S. at 692. In addition, a breach of counsel's duty of loyalty, "perhaps the most basic of counsel's duties," does not require a showing of prejudice if counsel "actively represented conflicting interests" and the conflict "adversely affected his lawyer's performance." *Id.* at 692; *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980) (if actual conflict shown, Court will not engage in nice calculations as to the amount of prejudice attributable to the conflict; conflict itself demonstrates denial of right to effective assistance of counsel); *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997) (conflict breaches duty of loyalty, most basic of lawyer's duties). In this case, it appears that Ernie may not have had any counsel at all in the critical pre-trial period and that, even at trial, his counsel divided his loyalty between aggressively representing Ernie and saving the County money by not hiring the experts Ernie needed. RR 8:14.

8. <u>Appellate Counsel</u>. Ernie's court-appointed appellate counsel missed several critical points in his motion for a new trial and in the direct appeal. In moving for a new trial, appellate counsel did not raise ineffective assistance of counsel, which in this case could have been developed outside the record through discussions with Ernie and his family, or present any evidence on two possible problems with the jury deliberations (namely, the jury's understanding that they had to reach a unanimous verdict and contamination from outside sources). *See* Jury Poll, Ex. 108; Russell Aff., Ex. 15; Gover Aff., Ex. 16 at ¶¶ 21-25; Butler Aff., Ex. 17 at ¶¶ 20-21. Second, in the appellate brief, appellate counsel did not raise the denial of the medical care defense or trial counsel's failure to obtain the medical records or review critical evidence (including the sexual assault photos) in advance of trial. Since each of these points is addressed

elsewhere, we will not address them here other than to note that since each of these points was evident from the record, the failure to raise or support them in the motion for new trial or on direct appeal constituted ineffective assistance of counsel.

C. Erroneous Expert Testimony.

1. Legal Standards. In determining the admissibility of expert testimony under Rule 702 of the Texas Rules of Evidence, the Texas Supreme Court and the Texas Court of Criminal Appeals have adopted the standards set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (*Daubert* standards apply in civil cases*)*; *Jordan v. State*, 928 S.W.2d 550, 553-555 (Tex. Crim. App. 1996) (*Daubert* two-prong standard of relevance and reliability "virtually identical" to *Kelly* standard; requires judges to act as gatekeepers to exclude "inadequately tested" scientific theories); *Kelly v. State,* 824 S.W.2d 568, 572 (Tex. Crim. App. 1992) (en banc) (providing test for reliability under Rule 702). Since the *Daubert* rules and procedures issues are well covered in a motion filed by the District Attorney in this case, we shall simply briefly review them here. *See* Ex. 100, First Amended Motion for Court to Examine Expert Witness for Qualifications and Admissibility of Opinions (State Motion). As the State acknowledges, these principles apply to all testifying experts. State Motion at 4, citing *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (en banc).

a. Prejudicial Impact of Experts. Texas Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

TEX. R. EVID. 702. In light of the increased use of expert witnesses and the potential prejudicial impact of their testimony, trial judges have a heightened responsibility to ensure that the expert testimony presented under Rule 702 is reliable. State Motion at 1, quoting *Robinson*, 923 S.W.2d at 553. This screening function is critical since "[e]xpert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness as an expert." State Motion at 4, quoting *Robinson*, 923 S.W.2d at 553. Indeed, "[t]o the jury, an 'expert' is just an unbridled authority figure, and as such, he or she is more believable." *Id.*

b. Procedure. Since a jury may be irrevocably tainted by unreliable expert testimony, Texas Rule of Evidence 705(b) provides that prior to the expert giving the expert's opinion or disclosing the underlying facts or data to the jury, the party against whom the opinion is offered shall, upon request in a criminal case, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. State Motion at 5, quoting TEX. R. EVID. 705(b). This examination shall be conducted out of the hearing of the jury. *Id.; see also* State Motion at 4. Issues to be explored outside the presence of the jury include (1) the qualifications of the expert; (2) the relevancy and reliability of the testimony to be proffered; and (3) an exploration of whether the prejudice of the proffered testimony outweighs its probative value under Texas Rule of Evidence Rule 403. State Motion at 4, citing *Martinez v. State*, 763 S.W.2d 413 (Tex. Crim. App. 1998) (en banc); *Alba v. State*, 905 S.W.2d 581 (Tex. Crim. App. 1995) (en banc) (defendant undeniably entitled, upon timely request, to conduct voir dire examination directed to underlying facts or data upon which expert opinion is based); *Goss v. State*, 826 S.W.2d 162 (Tex. Crim. App. 1992) (en banc) (party challenging expert must be permitted to voir dire expert outside presence of jury to determine foundation of opinion without

fear of eliciting damaging hearsay or inadmissible evidence in jury's presence). Once a party objects to the admissibility of evidence, the proponent bears the burden of demonstrating admissibility by clear and convincing evidence. State Motion at 2-3.

c. Substantive Requirements. To be admissible, the testimony of an expert must be both *relevant* and *reliable.* State Motion at 2. To be *relevant,* the scientific or other principles forming the basis of the testimony must be sufficiently tied to the facts of the case so as to aid the jury in resolving disputed issues of fact. State Motion at 2 (and cases cited therein). The expert's testimony must therefore take into account enough of the pertinent facts to assist the trier of fact. *Id.* To be *reliable,* expert testimony must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique or method applying the theory must be valid; and (3) the technique or method must have been properly applied on the occasion in question. State Motion at 2, citing *Kelly*, 824 S.W.2d at 573. In determining reliability, the trial court may consider a number of factors, including: (1) the qualifications of the expert; (2) the existence of literature supporting or rejecting the underlying scientific theory and technique; (3) the potential error rate; and (4) the experience and skill of the person who applied the technique on the occasion in question. State Motion at 3 (selected factors). If the court finds the expert to be qualified and the evidence to be relevant and scientifically valid, the Court must then determine whether the evidence should nonetheless be excluded because its probative value is outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury" or by the "needless presentation of cumulative evidence." State Motion at 4, citing *Robinson*, 923 S.W.2d at 557.

2. Application of Standards to State's Experts. In accordance with these procedures, the State filed a motion in January 2003 seeking to examine defendant's experts

outside the presence of the jury to determine: (1) their qualifications to testify as experts in this case; (2) the basis and foundation for their expert opinions and conclusions; (3) the relevancy and reliability of their opinions and conclusions; and (4) the probative value of their opinions and conclusions. State Motion at 6. This motion outlines the precise procedure that defense counsel should have followed with the State's experts. Without any knowledge of the medical facts or literature, however, Ernie's defense counsel did not conduct a voir dire of the State's experts to determine the basis, relevancy, reliability and probative value of their testimony. This failure was highly prejudicial since it permitted the State's experts, some of whom were unqualified to testify as experts, to provide medical testimony that did not meet the basic tests for admissibility.

a. Sexual Assault. In this case, the E.R. personnel did not merely testify on facts, i.e., on their observations, but rather gave their expert opinion that Isis' genital findings could only be caused by sexual assault. This testimony was wrong. In fact, the genital findings were nonspecific, inconsistent with assault, and most likely to have been caused by some combination of infection, a bleeding disorder and hospital procedures, including rehydration and the sexual assault examination.

(i) Qualifications. In deciding whether an expert is qualified, the trial court must "ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion." *Cooper Tire & Rubber Co. v. Mendez*, No. 04-1039, 2006 WL 1652234, at *2 (Tex. June 16, 2006). There is nothing in the record that indicates that the E.R. personnel at Northwest Texas Hospital had any expertise in diagnosing sexual assault in infants, particularly infants with bleeding disorders. The nurses were, moreover, explicitly prohibited by the Texas Nursing Practice Act from making any diagnosis. TEX. OCC. CODE ANN. § 301.002(2). The reason for this prohibition is obvious: while nurses may be qualified to testify

to what they have observed, they do not have the breadth of knowledge needed to diagnose the multiplicity of conditions, including bleeding disorders or infection, that can cause bleeding in very sick children, or to consider the impact of hospital treatment on particular symptoms. White Aff., Ex. 1 at ¶ 108. In this case, moreover, the nurses demonstrated their lack of qualifications by testifying to theories that had long been rejected by scientific research, the medical literature, and the courts. *See, e.g., Lindstadt*, 239 F.3d at 202 (2001) (quoting articles establishing that findings on the posterior fourchette are not directly linked to abuse) and Medical Literature on Child Sexual Assault, Exs. 114-126.[51] While Dr. Levy is qualified as a pediatric intensivist, he did not provide any credentials on diagnosing sexual assault, and his testimony confirmed that he did not understand the anatomy of infant genitalia and was entirely unfamiliar with the literature on child sexual assault. Because they were not qualified in this field, the nurses should have been permitted to testify as fact witnesses only, i.e., to describe what they saw without attempting to diagnose the cause. Dr. Levy should have been prohibited from testifying at all since he did not see the child's genitalia until *after* the nurses had completed their examination and was unqualified to interpret sexual assault photographs, particularly in the presence of a bleeding disorder.

(ii) Relevancy. To provide relevant testimony, the experts must be sufficiently familiar with the facts of the case to provide information that would be helpful to the jury. Since a wide range of medical conditions can cause bleeding and other symptoms in the vaginal and anal areas, diagnosing the cause of Isis' genital bleeding would require a sound knowledge of her medical history, including her pediatric reports, symptoms in the days before death, and laboratory reports. At trial, however, it was clear that the E.R. personnel diagnosed abuse

[51] In considering why the nurses' testimony was so far afield from the medical literature, it is appropriate to consider the possibility that Ms. Gorday, the program supervisor, was biased as a result of her own molestations. *See* Hueston Aff., Ex. 10 at ¶ 6.

without considering her pediatric records (documented diaper rash and nutritional concerns), clinical history (fever, failure to eat, respiratory problems, and black sticky stool requiring cleaning for several days before hospital admission), and laboratory reports (infection, bleeding disorder and liver dysfunction), as well as the impact of hospital treatment (CPR, rehydration and sexual assault examination). By assuming that Isis was well (or had at most, a "cold" in the days prior to death), the emergency personnel ignored the facts necessary to diagnose her medical condition, and their testimony therefore lacked any probative value. *See, e.g., Cooper Tire*, 2006 WL 1652234, at *5, quoting *Burroughs Wellcome Co. v. Crye,* 907 S.W.2d 497, 499 (Tex. 1995) (when an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment).

(iii) Reliability. The testimony of the E.R. personnel was also unreliable. The case law suggests a variety of factors that should be considered in assessing reliability, including: the existence of literature supporting or rejecting the scientific theory and technique; the experience or skill of the person applying the technique; and the known or potential error rate. Here, the theory advanced by the E.R. personnel – that bleeding, tears and disruptions in the posterior fourchette could only be caused by sexual abuse – was never scientifically validated but has instead been uniformly disproven in the research literature and rejected in the medical texts. *See, e.g.,* Medical Literature on Child Sexual Assault, Exs. 114-126. The technique used by Ms. Gorday was, moreover, improper: as discussed, no pediatric protocol allows the use of Q-tips to flip the hymen during the sexual assault examination. Since it is hard to believe that any child would not have minor bleeding and disruption in the genitalia given the combination of factors in this case (including pre-existing infection or inflammation, rapid rehydration, a bleeding disorder

and an improper sexual assault examination), Ms. Gorday's techniques would likely create a very high error rate, possibly as high as 100%. Dr. Levy's testimony was similarly subject to an unacceptably high error rate, for the literature indicates that diagnoses of sexual abuse by E.R. physicians is wrong nearly 80% of the time. Makoroff (2002), Ex. 126.

Since the diagnoses reached by the E.R. personnel have no scientific support or validity, the E.R. personnel should not have been permitted to testify to their opinions on sexual assault. As the Texas Supreme Court noted in a recent case, "[i]f the expert brings only his credentials and a subjective opinion, his testimony is fundamentally unsupported and therefore of no assistance to the jury." *Cooper Tire, 2006 WL 165234, at *3.* Or, as the Court said more dramatically in *Robinson,* even a person with a degree "should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system." *Robinson*, 923 S.W.2d at 558 (quoting party's brief). The Court of Criminal Appeals put it more plainly: "[u]nreliable . . . scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts." *Kelly*, 824 S.W.2d at 572 (quoting Kreling, *Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the goals of the Rules of Evidence,* 32 Ariz. L. Rev. 915, 941-42 (1990)).

(iv) Probative v. prejudicial value. Even if the E.R. personnel had been qualified and their testimony relevant and reliable, the Court would still have had to inquire as to whether any aspects of their testimony were unduly prejudicial, cumulative, or otherwise unhelpful to the jury. In this case, many people would be upset by the large screen (4' by 6') portrayals of Isis' genitalia, particularly if they knew (as it appears at least some of them did) that the child had

died, either before or shortly after the pictures were taken. It is not clear that any of these pictures should have been shown on a large screen, where even a pimple would look like a major eruption. At minimum, if the pictures were to be shown on a large screen, they should have been shown with a ruler to indicate their actual size. In addition, the initial pictures (photos 30 - 35) were all that was needed: these pictures showed clearly that there were no injuries to the labia majora or hymen, and that there was merely a small drop of blood, about the size of a split-pea, on the posterior fourchette. The subsequent photos were cumulative, prejudicial and misleading, for what they showed was the impact of a nurse who was flipping the hymen on a sick child with a bleeding disorder.

(v) General comments on sexual assault testimony. As noted earlier, the testimony in this case is the type of testimony that one might have expected to see in the midst of the daycare scandals, prior to any research on child sexual assault. Improper expert testimony of this nature is extremely dangerous since:

> Jurors are often expected to understand complex testimony regarding arcane scientific concepts and are even asked to resolve issues on which the experts cannot agree. Because expert evidence can be hard to evaluate, it can be both powerful and misleading. Consequently, some commentators believe that "ostensibly scientific testimony may sway a jury even when as science it is palpably wrong."

Robinson, 923 S.W.2d at 553 (citations omitted). This problem is enhanced when opinions precede the research, rather than the other way around. In *Daubert,* the Supreme Court emphasized that scientific methodology is based on generating hypotheses and testing them. *Daubert*, 509 U.S. at 593. As the Texas Supreme Court noted, "coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method." *Robinson*, 923 S.W.2d at 559. In this case, as in *Robinson, "*[i]nstead of reasoning from known facts to reach a conclusion, the experts here reasoned from an end result in order to hypothesize what needed to

be known but what was not [known]." *Id.* Although this might be acceptable in some areas – for example, as the Court noted, one might reasonably assume that "a fractured bone accompanied by bruised outer skin and flesh demonstrate that some type of physical contact caused the injury – *such reasoning cannot apply where several possible causes could have produced one effect.*" *Id.* (quoting *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 649 (8th Cir. 1994) (emphasis in original)).

As the Court discussed in *Daubert*, there is a vast difference between scientific and legal conclusions. While scientific conclusions are subject to perpetual revision, the purpose of law is to resolve disputes finally and quickly. Thus, science makes progress by advancing a multitude of wide-ranging hypotheses, eventually discarding those that are incorrect. Medicine proceeds similarly: initial diagnoses are not always correct, and it often takes years (and many experts) to correctly diagnose uncommon ailments. In law, however, initial conjectures that are probably wrong are of little use, for the legal system needs to quickly and finally reach binding judgments – often of great consequence – about a particular set of facts in the past. In this case, the E.R. personnel testified not only to hypotheses, but to hypotheses that had long been discarded. This type of evaluation may be appropriate in a scientific or medical setting, where incorrect hypotheses will eventually be corrected by research or feedback from patients, but it is entirely inappropriate in a criminal proceeding, in which the consequences are disastrous and difficult to correct. *See* Lyons, Ex. 172 at n. 165 (comparing legal system, which respects precedent, and scientific system, which discards old theories as advances are made); White Aff., Ex 1 ¶ 83 (initial diagnoses often wrong); Ex. 175, D. Risinger, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion,* 90 Cal. L. Rev. 1 (2002) (outlining factors causing errors in forensic science, including expectation bias, suggestibility, unsound evidence, cross-contamination of information, and the like).

(vi) Gatekeeping role. Because of the different needs of the scientific, medical and legal systems, judges must act as gatekeepers to prevent a multitude of hypotheses, most of which will ultimately be proven to be wrong, from being used as the basis for civil or criminal convictions. In cases involving medical issues, however, this can only happen if defense counsel familiarize themselves with the medical issues and literature, typically with the assistance of a medical expert. In this case, since defense counsel failed to familiarize themselves with the medical issues or research, they were unable to voir dire the State's experts, and the Court was unable to exercise its gatekeeping role, with tragic consequences for Ernie, who was convicted based on testimony by unqualified E.R. personnel who provided dramatic medical opinions that were directly contrary to the existing research and literature.

b. Shaken Baby Syndrome. While shaken baby syndrome may have passed muster under the *Frye* standards, which required only general acceptance in the field, it is an unproven hypothesis that could never withstand full-fledged *Daubert* scrutiny. *Frye v. U.S.*, 293 F. 1013, 1014 (C.A.D.C. 1923). Indeed, even the medical literature now confirms that there is no reliable scientific basis for this syndrome. *See, e.g.,* Donohoe (2003), Ex. 145; Leestma (2005), Ex. 151; Lantz (2006), Ex. 153. Instead, the symptoms used to diagnose shaken baby syndrome – retinal hemorrhage, subdural hemorrhage and brain swelling – are caused by numerous medical conditions, ranging from infection to choking on feed, and may further be caused or aggravated by hospital treatment, including rehydration. In this case, moreover, it appears that the subdural hemorrhage (the key diagnostic "criteria") is probably not a subdural hemorrhage at all but leakage from the dural vein, a condition that is associated with dehydration, not trauma. Had a proper voir dire been conducted prior to Dr. Levy's testimony, it would have been clear that shaken baby syndrome has never been scientifically validated and that Dr. Levy was not

qualified to testify on brain injuries. Indeed, in describing shaken baby syndrome, Dr. Levy referred to "[t]he model that we currently believe." RR 8:52 (describing shearing of bridging veins throughout the subdural space). Beliefs, even sincere beliefs, are not, however, sufficient to sustain a conviction. In this case, moreover, Dr. Levy's beliefs did not fit the facts, since the autopsy did not show shearing of the bridging veins throughout the subdural space but rather a thin-film hemorrhage that is more typical of bleeding from the dural vein.

We further note that, under *Daubert* and its progeny, the testimony of each of the State's experts suffered a fatal shortcoming: Dr. Levy knew more facts than Dr. McClain (including the presence of old bruises), but was not qualified to diagnose the cause of death and was unfamiliar with the literature. Dr. McClain, on the other hand, was qualified to diagnose the cause of death and was more familiar with the literature, but did not know the facts, including the age of the bruises and Dr. Vas' diagnosis of insect bites, which still cannot be entirely excluded. *See, e.g.,* Sunderland Aff., Ex. 4 at ¶ 15. Had Dr. Levy and Dr. McClain combined their knowledge and expertise, they may have been able to devise a hypothesis that fit both the facts and the medical literature. As it was, however, Dr. Levy attempted to diagnose and date brain injuries, an effort that was well outside his area of expertise, while Dr. McClain apparently was not given the facts on the timing of the contusions and abrasion, the possibility of insect bites, and the child's medical and social history. A proper voir dire would have limited Dr. Levy to what he knew and alerted Dr. McClain to the known facts. In either case, the jury would have been presented with a very different picture – a picture that would have allowed them to exercise their judgment based on facts and medical knowledge, rather than unproven hypotheses.

c. Timing. Of all the expert testimony, the most misleading testimony was the testimony of the E.R. personnel on the timing of the vaginal and brain hemorrhages. In a proper

voir dire, the nurses and Dr. Levy would have been required to identify the literature and tests upon which they relied to reach their conclusions. It is extremely unlikely that they could have passed this test since there is no medical literature allowing injuries to be timed with this degree of precision. As Dr. White points out, even without the complication of life support, the most recent neuropathology texts make clear that timing hemorrhages is inexact and unreliable – so much so that the Tarrant County Medical Examiner's Office does not time subdural hemorrhages at all. The tests that are available, moreover, are conducted by pathologists on slides, either through stains or histology (microscopic examination of slides). Since none of the nurses or Dr. Levy are pathologists, it is extremely unlikely that they are qualified to conduct these tests, or that they did in fact do so. Pollanen Aff., Ex. 5 at ¶¶ 47-51. It is extremely probable, therefore, that even a rudimentary voir dire would have excluded any testimony by the E.R. personnel on timing. And without this testimony, there would have been no reason to believe that Ernie had anything to do with Isis' injuries – the same conclusion reached by all reviewing physicians.

Unlike Dr. Levy and the nurses, Dr. McClain gave a substantially broader time range for the hemorrhages, testifying that they occurred within 24 hours of death. Dr. McClain's testimony suffers from the obvious defect that she also testified that the forehead contusions occurred within this same period, a conclusion that is known to be wrong. Even a 24-hour period is, moreover, a very narrow period in which to time hemorrhages, and Dr. McClain did not provide the basis for her conclusion or the tests that she employed. Was she looking for inflammatory responses, or did she use stains? And, if so, what type of stains did she use, and what did they show? The autopsy report does not contain any of this data. Her analysis would, moreover, have to take into account the impact of life support. Did Dr. McClain mean that the hemorrhages occurred within 24 hours of removal of life support, which would indicate that they

were post-admission artifacts? Or did she mean that they occurred within approximately 24 hours of arrival at the hospital, in which case there were many individuals with the child? All these factors should have been explored on voir dire.

D. Actual Innocence.

When the medical evidence is analyzed in accordance with current medical standards, there is no medical reason to believe that Ernie did anything to harm Isis. Looking more broadly at all the facts – including the social history, psychological evaluations and parenting skills of the parties – it is equally clear that Ernie and DeAnn did everything they could to care for Isis and all of the other children in their care. As Rebecca Hand notes in her affidavit, when she asked Ernie why they continued to watch Dr. Vas' children given the drama of Dr. Vas' life, Ernie said that "they did it for the kids." R. Hand Aff., Ex. 27 at ¶ 6.

Despite increased awareness of false convictions, however, it is still much easier to be falsely convicted than it is to be "un-convicted," particularly if there was no crime and thus no DNA evidence. There are, however, other standards for establishing innocence. In *Ex parte Elizondo,* the Court of Criminal Appeals held that "in . . . a *Herrera*-type claim of actual innocence, the petitioner must show 'by clear and convincing evidence' that no reasonable juror would have convicted him in light of the new evidence." *Ex parte Elizondo,* 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (en banc) (emphasis omitted) (granting habeas petition in child sex abuse case based on the recantation of the alleged victim).[52] In a *Schlup*-type claim, which combines actual innocence with a constitutional violation (such as ineffective assistance of counsel), the petitioner need only show that a constitutional violation has "probably" resulted in the conviction of an innocent person. *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (when a claim of

[52] In examining the legal sufficiency of the evidence, the court must consider whether there was sufficient evidence for any rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 321 (1979).

innocence is combined with constitutional error, the petitioner must show that it is "more likely than not" that no reasonable juror would have convicted him in light of the new evidence); *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002), citing *Ex parte Franklin,* 72 S.W.3d 671 (Tex. Crim. App. 2002) (a bare innocence claim involves a substantive claim in which applicant asserts innocence based solely on newly discovered evidence).

In this case, the evidence in the accompanying affidavits is sufficient to meet both the *Elizondo* and *Schlup* standards. In this case, had Ernie's counsel raised any possibilities other than sexual abuse – or had they even obtained the SANE Protocols, which are readily available on the internet – it is extremely unlikely that this jury or any rational jury would have convicted Ernie of sexual assault or anything else. See Juror Affidavits, Exs. 15-17; Jury Poll, Ex. 108. Similarly, had Ernie's counsel taken the trouble to find out why Dr. White said that the hemorrhages could not be timed in the manner suggested by the E.R. personnel, the timing testimony by the E.R. personnel would have been precluded or discredited. Without timing testimony, there would have been no reason to connect any of Isis' injuries to Ernie. Indeed, had Ernie's counsel even looked at the sexual assault photographs and the body diagram showing multiple brown bruises prior to trial, Ernie's counsel might well have been able to convince the jury that the medical evidence was wrong.

To some extent, the applicability of *Elizondo* and *Jackson* tests depends on the definition of "newly discovered" evidence. As in *Briggs*, the medical records on which the current affidavits are based were always in existence; the problem is that Ernie's counsel did not subpoena them, read the ones that they obtained seemingly by accident, or have them reviewed by medical experts. Thus, the records that are now available were "discovered" in the habeas process in the back of trial counsel's file, seemingly obtained around the time of trial, possibly as

part of a CPS subpoena for files on Alex' accusation of abuse against his grandfather. These records are often illegible, and habeas counsel has been unable to obtain other critical medical records, including color photographs,[53] the records of the CT scan and x-rays taken at the hospital, the transplant records, the neuropathology report, or the complete medical examiner file. Since we do not know what else will be "discovered" in this process, we suggest that full consideration of the *Elizondo* claims of actual innocence await a review of these records and any other information that becomes available through discovery in the habeas or capital cases.[54]

E. Blind Focus Investigation.

Ernie was arrested because the State conducted a blind focus investigation, reaching its conclusion first and collecting supporting facts later. Unlike the scientific process described in *Daubert,* moreover, the State did not discard its initial hypothesis when the facts disproved the theory. There had always been several obvious explanations for Isis' death, namely:

1. accident or abuse at the Vas home, as evidenced by the bruises and symptoms of head injury in the days prior to death;

2. natural disease processes, as evidenced by the clinical history and laboratory reports; or

3. abuse at the Lopez home, with no supporting evidence.

The State selected option 3 – the only option that was not supported by evidence – almost immediately upon Isis' arrival at the hospital. After that, the State ignored all contrary evidence: laboratory reports showing infection and a bleeding disorder; a negative sexual assault examination kit; DNA evidence that was consistent with caretaking, not assault; sexual assault photographs that showed no injuries to the external genitalia or hymen; lack of blood or other

[53] The only available photographs are a few black and white photocopies of photographs from the CPS file. These copies show Isis in the hospital, connected to tubes. In these photographs, she appears bloated and over-hydrated.

[54] We also note that additional medical research is continuing to become available on both the sexual assault and shaken baby claims.

signs of assault at the Lopez home; evidence of Dr. Vas' mental instability and negligent childcare; Ernie's excellent psychological and parenting evaluations; well-cared for children at the Lopez home – and, most of all, an autopsy report that linked the old bruises to Isis' death.

As the facts came in, however, *no one* – not the medical personnel, not the police, not the District Attorney, not even Ernie's lead defense attorney – appeared to notice that the evidence supported options 1 and 2 and directly refuted 3. By trial, this evidence presented overwhelming support for options 1 and 2, particularly when combined with dehydration and inappropriate medical care in the days before death and Dr. Vas' refusal to take Isis to the pediatrician or emergency room for fear that she would be accused of abusing her. In addition to the physical evidence, those who knew Dr. Vas and those who knew Ernie all reached the same conclusion: Ernie was not capable of harming a child in the manner suggested by the State, while Dr. Vas had a well-documented history of mental instability and negligent childcare. A parade of people shared their knowledge with the police and the District Attorney's office, neither of whom were conducting any investigation. Instead of re-thinking its theory, however, the State responded by seeking to intimidate witnesses and moving, successfully, to exclude all evidence of Dr. Vas' negligence and poor parenting practices from trial, eliminating the most likely cause of death and Ernie's most obvious defense. The State's failure to pursue obvious leads or address contrary facts, combined with an affirmative effort to withhold such evidence from Ernie's defense counsel and the Court, denied Ernie his constitutional right to a fair trial.

Investigatory errors rise to the level of constitutional error when the State's actions lead to the denial of the applicant's right to due process and fundamental fairness, viewed under the "totality of the circumstances." *Ex parte Brandley*, 781 S.W.2d 886, 892 (Tex. Crim. App. 1989) (en banc), *cert. denied,* 498 U.S. 817 (1990). When the evidence is circumstantial, state

misconduct during the investigatory stage is more likely to affect the outcome of the trial – and thus to constitute constitutional error – than when there is direct evidence linking the defendant to the crime. *Id.* To determine whether the state's improper investigatory procedures violated due process, the Court held that a constitutional violation has been committed if the information that should have been made available – but was not in fact made available as a result of failure to conduct appropriate scientific tests, failure to pursue appropriate leads and/or nondisclosure of the information that did become available – creates "a reasonable doubt that did not otherwise exist." *Id*. at 893 (quoting *U.S. v. Agurs,* 427 U.S. 97 (1976)). The Court held that the cumulative effect of the investigative procedures in *Brandley*, judged by the totality of the circumstances, resulted in a constitutional violation, even though any of the incidents alone might not justify the claim. *Id.* at 894. The Court further observed that racial prejudice may have played a role since there was some evidence that a police officer told a witness that "'the nigger' . . . was big enough to have committed the crime; therefore, 'the nigger was elected.'" *Id.* at 890.

All of the basic elements of *Brandley* were present in this case, albeit in a somewhat more sophisticated form. As in *Brandley,* the investigators reached a conclusion at the onset and ignored all evidence and leads that did not comport with their theory. As in *Brandley,* the State investigators set out for a quick arrest: in *Brandley,* a new investigator arrested Brandley the day after assignment, without proper interviews; in this case, Ernie was arrested less than 3 hours after hospital admission, before the investigators interviewed DeAnn or anyone other than Ernie, reviewed the laboratory reports or searched the home. As in *Brandley,* the State did not look at the physical evidence: the rape exam kit and diapers collected at the Lopez home sat at the

police station for 8 months, without analysis. Nor did they pay any attention whatsoever when the results of the analyses were negative.

As in *Brandley*, moreover, the investigators ignored all other leads. Despite a virtually complete lack of investigation by the State, witnesses appeared at the police station and the District Attorney's office pointing out other obvious possibilities. In *Brandley,* one of these witnesses later indicated that the police "were not real interested in [her] information and were in a rush to get [her] off the phone." *Id.* at 891. In this case, too, the State received information from reliable witnesses, including Lorrie Word and Dr. Shelton, alerting them to Dr. Vas' negligent parenting (Word) and failure to provide medical care for Isis in the days before her death due to Dr. Vas' fear that she would be accused of abuse (Shelton). Instead of considering the possibility that Isis' death was related to the bruises occurring while at the Vas home, the prosecutors responded by attempting to intimidate Ms. Word, telling her (falsely) that what she had seen was "hearsay" (the same technique used in *Brandley*, *id.* at 891), that Ernie had already confessed and was taking a plea bargain (also false), and, when this didn't work, simply ignoring the information she provided:

> I spoke to the district attorney's office at least twice. Both times they asked me to come to the office. On one visit, I spoke to two men. One just listened, the other shouted and pounded the table. I told them about Veronica leaving Isis alone, about Veronica giving daiquiris to Alex and Emily, and about Veronica's dad's behavior. The man who was shouting would ask me questions like, "did anyone else see it?" or "do you have proof?" No matter what I said, he said that it was hearsay. They weren't interested in anything about Veronica's dad because they said I didn't have any solid proof or evidence.
>
> I especially remember the one man yelling about hearsay because when he said it, he pounded on the desk and leaned forward, almost in my face. I finally got angry and said I was just telling him what I saw and that I couldn't see how that could be hearsay. I also tried to tell him about other people who had seen some of this, but he didn't want any of this information. He said that they couldn't consider it because I didn't have pictures and hadn't kept a journal.

On one of the visits, I was at the D.A.'s office for about an hour. The other one may have been shorter. On one of the visits, I finally told them that I thought they just found it a lot easier to convict a Hispanic babysitter than a white doctor. One of the men told me that it was 100% certain that Ernie was guilty, that he had already confessed, and that they had absolute evidence he did it. They said he was going to do a plea bargain.

Word Aff., Ex. 22 at ¶¶ 54-56. Dr. Shelton didn't fare much better:

When I learned that the child had been bruised and ill for several days before her death, I asked Veronica why she hadn't taken the child in for treatment or reported the bruises, which apparently occurred before the child went to the Lopezes. She said that she was afraid that the pediatrician or emergency room personnel would think that Isis had been abused. I understood that she was afraid that she (or possibly her father) would be accused of harming the child.

While I was aware that the State was primarily investigating Ernie Lopez, it seemed clear that a medical investigation would not be complete without looking at the child's medical condition in the days before her death, as well as Veronica's actions and mental stability. Given the patterns that I had seen over the preceding year, it seemed likely that neglect had played a role in Isis' death and that Veronica had failed to provide appropriate medical care.

I told the District Attorney's office of my concerns on at least two occasions. The first time, Rebecca King asked my wife and me to come to her office. At that meeting, I told Ms. King of my concerns with Veronica's mental instability and poor judgment. I also gave her much of the specific information set forth above, including Veronica's leaving Isis unattended in July. She was impassive and did not appear interested in obtaining documentation . . .

. . .

At some point, the District Attorney's office apparently learned of Alex's statements concerning possible abuse by his grandfather. Shortly before Mr. Lopez' trial, one of the Assistant District Attorneys called me to his office and told me that I would not be needed to testify at trial. He said that the State had all the evidence that they needed, and that the evidence at trial would be restricted to approximately an hour before Isis came to the hospital. Any earlier information would not be admissible, nor would Alex' 2002 outcry on possible abuse by Veronica's father. As I tried to make clear, I did not think that limiting the evidence to the hour or so before hospital admission was appropriate from a medical perspective.

. . .

As a physician, I find it surprising that no effort appears to have been made to determine the cause of the bruising or discolorations on the child's face, particularly given Veronica's statements that these appeared to be spider or other

> insect bites. It also appears that some of the tests that should have been run (including complete toxicology screens and blood cultures prior the administration of antibiotics) were not done, making it more difficult to determine the cause of death with any degree of certainty.

Shelton Aff., Ex. 20 at ¶¶ 35-37, 39, 47 (emphasis added) (also indicating concern that Isis might have been accidentally injured by Alex, who was large for his age and somewhat rough; and explaining the medical issues, including other causes of genital bleeding). Dr. Werner, Isis' pediatrician, also told CPS of her concerns with Dr. Vas' poor judgment and negligence, but there was no follow-up. CPS Vas Investigation, Ex. 77 at 7. Dr. Shelton's concern for his own children was well-founded: any father would be concerned to learn that his children's half-sibling had died while covered with bruises that had arisen while in their mother's care. No one, however, apparently shared Dr. Shelton's concern.

As in *Brandley,* the State did not disclose any of the information provided by outside witnesses to Ernie's counsel, even though they clearly supported Ernie's statements that Isis was injured and ill before coming to the Lopez home and created an obvious alternative cause of death. *See Brandley*, 781 S.W.2d at 888 n.2 and 891 (failure to disclose leads to possible other perpetrators). When the autopsy report arrived, moreover, the District Attorney attempted to withhold it, forcing Ernie's counsel to file a motion under the Open Records Act. Ex. 97 (Defendant's Motion for Discovery). While defense counsel eventually obtained much of the information that had been withheld, the State's failure to provide this information raises considerable doubt as to whether the State has yet shared all exculpatory information, particularly in view of the State's present refusal to allow Ernie's habeas and capital counsel access to the file under the District Attorney's normal open file policy, a step taken in apparent

retaliation for Ernie's decision to pursue a habeas petition based on actual innocence. *See* Pro Hac Vice Motions, Ex. 113 at 4 (State Response).[55]

Equally important, the State's blind focus investigation ignored the medical literature on child sexual assault. By the time of Ernie's arrest in October 2000, the State was well aware that the medical research established that injuries to the posterior fourchette are nonspecific findings that have many possible causes, including childhood rashes. Indeed, following oral argument on precisely this point, the Court of Appeals for the Seventh District (Amarillo) (unpublished) remanded the *Ramos* case for a full evidentiary hearing. Ex. 169(e). In September 2000, just before Judge Ron Chapman began the evidentiary hearings, the District Attorney proposed a settlement that granted the habeas petition and overturned the conviction. The settlement was approved by the Court of Appeals in December 2000. As this suggests, at the time of Ernie's arrest, the District Attorney knew that the medical research conducted in the late 1980s and early 1990s established that findings on the posterior fourchette and hymen previously attributed to abuse also had numerous other causes, and that the sexual assault nurse examiners at Northwest Texas Hospital had not kept abreast of this literature, resulting in at least two misdiagnoses.[56] *See, e.g.,* Ex. 169 (b), (c), (f) (excerpts from *Ramos* file, including excerpts from appellate brief addressing medical issues; affidavit and newspaper clipping in Wilson case; and settlement

[55] The District Attorney's office subsequently advised Ernie's habeas counsel that the file has in fact been closed both to habeas counsel and to Ernie's court-appointed capital counsel.

[56] The first misdiagnosis was in the *Ramos* case, in which the State obtained a conviction for aggravated sexual assault based in part on the testimony of a SANE nurse at Northwest Texas Hospital despite the fact that the child described her father treating her vaginal rash by washing her with a washcloth and putting medicine on her rash. The second was in the *Wilson* case, in which a child who had been diagnosed with *E. coli* and diarrhea was sent from the Perryton hospital to Northwest Texas Hospital, where a sexual assault nurse examiner concluded that she had been vaginally and anally assaulted based on discoloration in the anal area and a small tear in the posterior fourchette. The child's parents were escorted from the hospital, leaving their daughter to die unattended In a 1997 affidavit, Mrs. Wilson said that she did not "understand how any medical professional could mistake the signs of HUS [a complication of e. coli] with sexual abuse" – particularly since the child had already been diagnosed with *E coli*. Ex. 169(c).

granting habeas petition in *Ramos*). This was exculpatory information that should have been provided without hesitation to Ernie's counsel.

Finally, as in *Brandley,* this investigation had racial overtones. As Ms. Word pointed out to the District Attorneys, the hospital and the State seemed to find it much easier to blame a Hispanic babysitter than a white doctor for Isis' death. To address the role of ethnicity and status, one need only ask the question posed by John Grisham in *A Time to Kill*: if the people were reversed, would this case have been brought? If Ernie Lopez had taken his own child, covered with bruises and sick for days, to a white doctor, and the child had died 40 minutes later while in the doctor's care, who would have been arrested? Ernie, or the white doctor? If the answer is still "Ernie," then the role of race and status is obvious. In the *Ramos* case, LULAC passed a resolution saying that if the *Ramos* conviction was allowed to stand, no Hispanic man could safely care for his children. Ex. 169 (g). The *Ramos* conviction was not allowed to stand; yet it seems that LULAC's prediction may nonetheless have been fulfilled in this case.

For 2½ years, all of the evidence continued to support Ernie's innocence and Dr. Vas' culpability. Dr. Vas did not merely fail Isis as a mother; she also failed her as a doctor, for no conscientious doctor would have told the babysitters to give Isis prescriptions for their own children or failed to provide aggressive medical care, which by Friday would likely have required hospitalization and IV hydration. However, instead of considering alternative leads and providing exculpatory information to Ernie's counsel, the State simply continued its blind focus investigation on Ernie. Thus, a one-sided investigation was followed by a one-sided trial – a trial in which neither the Court nor the jury was provided with the information necessary to make appropriate rulings or reach a just verdict. Instead, as in *Brandley,* "[t]he State's investigative procedure produced a trial lacking the rudiments of fairness." *Brandley*, 781 S.W.2d at 894**.**

F. Jury Selection: Voir Dire.

Under the U.S. and Texas Constitutions, an individual accused of a crime has a right to trial by an impartial jury. U.S. CONST., amend. VI; TEX. CONST., art. I, § X; *Duncan v. Louisiana,* 391 U.S. 145, 153 (1968). In this case, because the voir dire was inadequate and misleading, the jury that was impaneled likely contained some jurors who were biased and others who misunderstood the legal standards to be applied in reaching their verdict.

1. Biased Jurors. A defendant's right to an impartial jury includes the right to an adequate voir dire to identify unqualified jurors. *Beckner,* 69 F.3d at 1291 (citing *Morgan v. Illinois,* 504 U.S. 719, 729-30 (1992)). As the Fifth Circuit noted, "[b]ecause jurors exposed to pre-trial publicity are in a poor position to determine their own impartiality . . . the district courts must make independent determinations of the impartiality of each juror." *Id.* at 1291. To make such a determination, the district court must first ask jurors "what information they have received, ask responding jurors about the prejudicial effect of such information, and then independently determine whether such information has tainted jurors' impartiality."[57] *Id.* at 1291-92. In Amarillo, this case received substantial pre-trial publicity since it was viewed as sensational. *See* Amarillo Globe Newspaper Articles, Ex. 81 (articles from only daily newspaper, with headlines, reading "Police arrest local man in death of 6-month-old," "Babysitter arraigned in sexual assault of 6-month old girl," and the like); *see also* R. Hand Aff., Ex. 27 at ¶¶ 13, 15-17; Looney Aff., Ex. 26 at ¶ 17 (Ernie's arrests and indictments also featured on Amarillo's television stations). Somewhat surprisingly, none of these reports mention that the child's parents were local doctors – with Dr. Miller still practicing at Northwest Texas Hospital and Dr. Vas having just completed her residency and at that time working in the

[57] While there are some variances between federal and state voir dire procedures, the same constitutional principles apply.

Emergency Room in Dumas, just 45 minutes away. Since Amarillo is not a very large city, there was also a substantial rumor mill since it seemed like almost everyone in Amarillo knew one or more of the participants, which included doctors, lawyers and nurses.[58] *See, e.g.,* R. Hand Aff., Ex 27 at ¶¶ 13, 15-17. Given the pre-trial publicity and sensational nature of the case, the voir dire process was inadequate to determine whether potential jurors had knowledge of the case or were emotionally equipped to deal with a case involving the alleged rape and murder of an infant. It now appears likely, moreover, that at least one of the impaneled jurors had outside information that caused him to hold out for a guilty verdict. Gover Aff., Ex. 16 at ¶¶ 21-25; Butler Aff., Ex. 17 at ¶¶ 20-21. This was particularly disastrous since the jury understood that they could not have a hung jury. Russell Aff., Ex. 15; Gover Aff., Ex. 16 at ¶¶ 24-26. *See also* Part VII.B.5 above (ineffective assistance of counsel due to inadequate jury voir dire, which failed to probe potential jurors' knowledge of case or emotional sensitivity to its allegations).

2. <u>Reasonable Doubt Standard</u>. As the U.S. Supreme Court has repeatedly made clear, the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure because it operates to give concrete substance to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson*, 443 U.S. at 315, partially quoting *In re Winship*, 397 U.S. 358 (1970) (internal quotation marks omitted). Because of the importance of this standard, an improper reasonable doubt instruction is not susceptible to a harmless error analysis. *Sullivan v. Louisiana,* 508 U.S. 275, 280-81 (1993). The *Winship* doctrine is not simply a trial ritual: instead, it requires that the factfinder rationally apply the standard to the evidence. *Jackson*, 443 U.S. at 316-17. Since this standard is not susceptible to precise definition, the better practice is

58 The interrelationships among Amarillo residents are often hard to disentangle, at least for out-of-state counsel. For example, we recently learned that Dr. Levy's wife is an attorney in the District Attorney's office, creating an obvious conflict of interest. We do not know when she assumed that position.

to give no definition of reasonable doubt at all to the jury. *See, e.g., Paulson v. State,* 28 S.W.3d 570, 573 (Tex. Crim. App. 2000) (confirming that better practice is no definition at all); *Cage v. Louisiana,* 498 U.S. 39, 41 (1990) (terms such as "grave uncertainty," "actual substantial doubt" and "moral certainty" impermissibly reduced State's burden of proof) (overruled on other grounds; now requires "reasonable likelihood" that jury led astray by instruction); *Cain v. Morris*, 186 F.3d 581 (5th Cir. 1999); *Commonwealth v. Ferreira,* 364 N.E.2d 1264, 1272 (Mass. 1977) (conviction reversed based on jury charge that equated the reasonable doubt standard with important decisions affecting the jurors' economic or social lives, such as marriage, divorce or buying a house) (decision joined by Kaplan, J.). As the Court pointed out in *Ferreira*, "far from emphasizing the seriousness of the decision before them, [these examples] detracted both from the seriousness of the decision and the Commonwealth's burden of proof." *Id.* at 1273.

In this case, the reasonable doubt standard suggested by the prosecutor during voir dire was a clear misstatement of the reasonable doubt standard:

> *I believe that every one of you, through life's experiences make decisions <u>every day of your life</u> on a basis of beyond a reasonable doubt. Not beyond all doubt and let me give you an example.*
>
> *How many of you have made a very important decision in your life?* I mean it was critical that you made the right decision. *Might have been about medical care for your children. Might have been a very expensive purchase, like a house*, okay? You, when you are going to make those decision, don't you get as much information from people who should know as you can? If it's medical you want to talk about the doctor and the hospital and what are the procedures, what are the alternatives? . . . No matter how much information you get, how many of you on, the most serious decisions you have ever made, were scared spitless when you made the choice? Why? Because there's always unanswered questions. . . You're going to have doubts at the end of this trial. About some things. And some things will be so obvious and open and apparent you will not be allowed in your own mind to ignore them, and you will reach a level of certainty. And if it's beyond – it can even be beyond a reasonable doubt with doubts in your mind.

RR 3:76-77 (emphasis added). A little later, the prosecutor went on to say:

> State: How many of you think you have made decisions beyond a reasonable doubt in your life time? How many of you feel that after my explanation – generally, **please show me from a raising of your hands, you don't believe you have? Have you not made any serious decisions?**
>
> Venireperson (VP): Yes, but –
>
> State: Okay. But what? Tell me what.
>
> VP: I have questioned myself on them lately.
>
> State: Okay. Some fast decisions.
>
> VP: Yes.
>
> State: I question myself on decisions all the time.
>
> VP: You are always going to have doubt.
>
> State: You made the decisions. You know you maybe even regret some, sometimes, okay? We are going to want to reach a level of surety. Are you going to require me to remove all doubt about this case?
>
> VP: No.
>
> State: Do you expect there will be some unanswered questions?
>
> VP: Yes.

RR 3:79-80 (emphasis added). As this suggests, the prosecutor not only equated the reasonable doubt standard with "serious decisions" in everyday life but berated jurors who did not feel they had applied this standard or did not feel that the standard used for such decisions was appropriate. Thus, while the defense was not allowed to prepare the jury for the fact that this case involved the alleged rape of an infant, the prosecution was preparing the jury for the fact that this case would have many faded, broken and missing pieces. RR 3:75 (impossible for me prove an event to you without doubts "and sometimes substantial doubts, okay?"); RR 3:76

(evidence may raise doubts but the law says that's okay; we are putting puzzle together and will never have all the pieces, trying to put enough pieces together so that even though there are missing, broken and faded pieces, you can get enough of the big picture to go "Yes"); RR 3:76 (compares reasonable doubt standard to game of Concentration).

In fact, however, the reasonable doubt standard is not the standard used to make decisions in everyday life, nor is it the legal equivalent of putting together a puzzle with missing, broken and faded pieces: instead, it is a standard unique to criminal law, and it imposes a much higher standard than the standard used for everyday decisions, and it looks with disfavor at guessing at the missing pieces, particularly critical pieces (as in this case).[59] While the prosecution's portrayal of the reasonable doubt standard might have been overcome by a vigorous objection from the defense or interjection by the Court, it does not appear in this case that the instruction was overcome.

3. <u>Expert Testimony</u>. The State's explanation of the role to be given experts was also improper. After telling the jury that they were to examine the credibility of all witnesses, including police officers, preachers, doctors and lawyers, the prosecutor went on to say:

> **The law permits one category of witness to get a leg up or a boost, if you will. They are called expert witnesses.** And an expert witness is someone who has specialized knowledge in a specialized field that's not generally known to people, okay? Either through training, experience or some sort of an expertise. A doctor, a scientist, a chemist. It could be an auto mechanic if he knows certain things you know bout mechanics and trust me they are all experts as far as I'm concerned. Does everybody see? And what the law says is this – would you expect to see experts, perhaps in a trial like this? Of course. There can be nurses, doctors, chemists, if it's DNA it's going to be those types of testings they do . . . **There's going to be some doctors or some medical people. Some of them will have specialized training that we generally do not have.**

[59] Were an example to be given, it should be closer to the removal of life support for a wife or child, for that too is an irreversible decision that has a major impact on the entire family.

> **The law says you are allowed to give more weight to their testimony in their field of expertise over and against somebody who testifies in the same field but doesn't have their expert credentials. For instance, a doctor talks to you about illness and injury, and then I talk to you about illness and injury. Who can you give the – the leg up to? The doctor. Because that's his area of expertise.**
> . . .
>
> **However, if it's two experts, one against the other, you still have the right to make the credibility decisions.** You can listen – even though you are not an expert – you can listen to them, decide whether or not you feel more comfortable believing, you can decide which one makes sense – **because sometimes two experts talk about a field and common sense tells you this one's right and this one's wrong. That is still the jury's decision. Does everybody feel comfortable with that? If you have two experts in a field, and they have different opinions, you are allowed to pick who you want to believe and what makes sense** . . .

RR 3:107-109 (emphasis added). The suggestion that the jury can only judge the credibility of experts when there are two or more experts is, however, incorrect. Instead, it is well-settled that the same criteria applies to experts as to any other witness:

> [The jury] may accept or reject in whole or in part the opinion testimony of physicians. They may accept lay testimony over that of experts. Opinion testimony does not establish material facts as a matter of law . . . . "If the opinions of the experts as given in the evidence do not comport with the jurors' idea of sound logic, the jurors have a right to say so."

Muro v. Houston Fire & Cas. Ins. Co., 329 S.W.2d 326, 331 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (citations omitted). The jurors also have the right to determine whether the expert testimony fits the facts, for "[i]f an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts," the expert opinion has no probative value whatsoever and cannot support a verdict or judgment. *Archer v. Warren,*118 S.W.3d 779, 788 (Tex. App.—Amarillo 2003, no pet.). The only exception arises when "the subject is one for experts or skilled witnesses alone, where the jury or court cannot properly be assumed to have or be able to form correct opinions of their own based upon evidence as a whole and aided by their

own experience and knowledge of the subject matter of inquiry." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1987). Instead of objecting to the prosecutor's instructions, Ernie's defense counsel appeared to agree with them. RR 3:197-199.

In this case, much of the evidence on which the State's experts relied did not require any particular expertise, nor did it conform with facts that are known to most laymen. For example, the jurors understood the relative size of infant genitalia and an adult male's penis, hand and/or fist, as well as the consequent improbability of sexual assault given the lack of external blood or injury to the child's external genitalia, which they could see for themselves. Thus, based on their own experience and knowledge, 8 jurors felt that Ernie was innocent despite uncontroverted testimony by the State's experts that the child had been sexually assaulted within an hour of hospital admission. However, the jurors understood that they were bound by the medical evidence presented by the State's experts unless the defense presented its own expert, even if the testimony of the State's experts flew in the face of their own common sense – precisely the standard suggested by the State during voir dire. *See* Gover Aff., Ex. 16 at ¶¶ 6-8, 28 (did not think penetration by penis physically possible given size of baby and her injuries, which were small; however, medical testimony was unequivocal; even though prosecution's case didn't seem to make sense physically, had no choice but to vote guilty given undisputed medical evidence and inability to have a hung jury); Butler Aff., Ex. 17 at ¶¶ 6, 9-10 (didn't look like any real penetration; however, medical evidence said he was guilty; understood we were supposed to rule on the medical evidence, not on what we felt). Ironically, however, it was the experts who were wrong and the jurors who were right, as confirmed by the medical literature and the attached affidavits. *See, e.g.,* Soderstrom Aff., Ex. 2 at ¶¶ 5, 23, 33; Sunderland Aff., Ex. 4 at ¶ 12. .

G. Exclusion and Omission of Relevant Evidence.

Rule 401 of the Texas Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. Evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if evidence provides a small nudge toward proving or disproving some fact of consequence. *Levario v State*, 964 S.W.2d 290, 297 (Tex. App.—El Paso 1997, no pet.). In general, evidence is relevant if the trial court believes that a reasonable juror would conclude that the proffered evidence alters the probability of truth or falsity of any fact of consequence. *Rodriguez v. State,* 857 S.W.2d 102, 107-08 (Tex. App.—Corpus Christi 1993, no writ).

In this case, the jury was being asked to choose between several possible causes of Isis' injuries and death, namely, (1) accident or abuse occurring at the Vas home; (2) natural disease processes; or (3) abuse occurring at the Lopez home. Similarly, the jury was being asked to determine whether Isis' genital bleeding was (1) secondary to illness and hospital treatment, possibly caused by the cleaning of black stool from the vaginal area and the sexual assault examination itself; or (2) caused by sexual assault. At trial, however, virtually none of the evidence supporting any options other than option 3 on death (abuse at the Lopez home) and option 2 on the genital injuries (sexual abuse) was introduced. Instead, most of the evidence supporting option 1 on the cause of death (accident or abuse at the Vas home) was excluded, while the evidence supporting option 2 (natural disease process) was omitted seemingly because no one looked at the clinical history or laboratory reports, not even Ernie's defense counsel. Thus, the only evidence presented at trial was expert testimony on the State's preferred theories. The omission of relevant testimony arose from four sources: (1) an inadequate and biased

investigation by the State; (2) an equally inadequate investigation by Ernie's defense counsel; and (3) several incorrect rulings by the Court, based in large part on inadequate briefings by the State and Ernie's defense counsel.

The first incorrect ruling was the decision to bifurcate the trial. This prevented the jury from seeing Isis' genital bleeding in the context of her overall medical condition, including the possible consequences of long-term neglect and a documented bleeding disorder. Unfortunately, despite the Court's request for briefing, this issue was never briefed. It arose, moreover, during a period in which Ernie appeared to be virtually unrepresented by counsel.

The second error was the grant of the State's Motion in Limine. The written motion precludes the mention that "any other hearings, including . . . child custody hearings, child protective service determination(s), or any other hearing arising from or encompassing any or all of the facts in this cause, have been held, if they were, and the results or findings of said hearing officers, jury or other fact finders" prior to a Rule 403 hearing. Ex. 98. The obvious intent was to ensure that the jury did not learn that CPS had found Dr. Vas guilty of negligent supervision and failure to provide appropriate medical care for Isis, and that the Family Court had transferred custody of the two older children to Dr. Shelton, with supervised visitation only to Dr. Vas until she could pass a psychological evaluation. While there is no order granting or denying the motion in the State's file, it is our understanding that further pre-trial proceedings were held and that the parties were prohibited, either by agreement or by Court order, from introducing any evidence that might seek to "shift the blame," including evidence on "the sexual proclivities of the mother of the child . . . CPS matters related to the children that followed this event – not preceded it . . . dirty houses, bad motherhood and things like that" about either Dr. Vas or her father. RR 3:6-8 (with reference to motion in limine being granted in full; such matters remote,

irrelevant and improper). While the Motion appears to allow the defense to seek a ruling on specific evidence outside the presence of the jury, it also appears that all parties treated it as a *fait accompli.* In fact, however, this evidence was directly relevant to the most likely alternative causes of death and secondary symptoms, for it supported the options of injury through abuse or accident at the Vas home and illness or infection due to lack of sanitation. By precluding evidence on the alternative explanations for Isis' medical condition, Ernie was deprived of a defense.

The third error was the exclusion of Alex' allegation that his grandfather had abused him two years after Isis' death. Since Ms. Vas' father was also Isis' primary caretaker in the days before her death, when the unexplained marks and bruises appeared on her face and chest, this allegation was relevant since it would almost certainly "nudge" the jury in the direction of concluding that any injuries identified at autopsy were inflicted by Isis' grandfather, not Ernie.

Whether one attributes the exclusion of virtually all relevant information on alternative causes of death and injury to the biased investigation, the ineffective performance of Ernie's defense counsel, or the Court, the outcome for Ernie was the same: because critical information was omitted or excluded from the trial, Ernie was convicted despite the fact that the evidence as a whole (including that excluded or omitted) overwhelmingly established *innocence*, not guilt. In the trial, Dr. Levy described himself as a medical detective, putting all of the facts together. RR 8:47. In this case, however, by the time the case got to the jury, at least two-thirds of the facts were missing, making it impossible for the jury to reconstruct what had actually happened. Regardless of the cause, the missing facts denied Ernie his constitutional right to present a defense. *See, e.g., Potier v. State*, 68 S.W.3d 657, 659-662 (Tex. Crim. App. 2002) (en banc) (and cases cited therein) (under U.S. Supreme Court precedent, exclusion of relevant evidence

violates due process if it goes to the heart of a defense or would create a reasonable doubt that did not otherwise exist; evidence of relatively minor importance may be sufficient to create reasonable doubt in a close case). Here, this was not really even a close case, for if one looks at all of the facts, rather than just a selected few, it is obvious that Isis died from injuries, infection or illness occurring prior to arrival at the Lopez home, aggravated by dehydration and improper medical care, with genital bleeding secondary to infection, a bleeding disorder and hospital treatment, including the sexual assault examination.

H. <u>Medical Care Defense</u>.

At the close of the guilt/innocence phase, Ernie's counsel requested an instruction on the medical care defense, as explicitly provided by statute. TEX. PEN. CODE ANN. § 22.021(d) (Vernon 2003). Mr. Wilson requested the following instruction:

> It is a defense to the prosecution of aggravated sexual assault that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus or sexual organ of the actor – of the defendant.
>
> Accordingly, if you find beyond a reasonable doubt that Ernest Lopez II, did then and there intentionally or knowingly cause the penetration of the female sexual organ of Isis Charm Vas, a child who was then and there younger than 14 years of age, by an object unknown to the grand jurors but you have a reasonable doubt as to whether or not the conduct consisted of medical care for the child, and if such conduct did not include any contact between the anus or sexual organ of the child and the mouth, anus or sexual organ of the defendant, then you shall acquit the defendant and say by your verdict not guilty.

RR 7:166. The State objected, saying:

> Judge, I believe that's more of a defensive nature. There is not – I don't believe there's been any evidence in this case that there was a medical treatment of that particular area other than normal diaper change and so I think it is more of a defense as to what his criminal intent was and would not be entitled to a defensive instruction. Certainly not that.

RR 7:166-167. Mr. Wilson indicated that he would like to respond in case "someone zealous" might later read the record:

> We have explained, off the record, our concerns to the Court that in this type of case, technically speaking, the cleaning of a child would be aggravated sexual assault. There is evidence in this case by virtue of much testimony and – and more specifically, Mr. Lopez's testimony that he did clean the child, that he did not cause the trauma to the child or intend to cause the trauma to the child. There is no other mechanism in the law to allow a defense, other than the defense of medical – of the medical treatment. And I – I told the court, I'm unaware of whether that covers that. But there is nothing else there. I don't believe it is the intent of the law that a person could be prosecuted if, in fact, a jury found that they were simply cleaning a child. So, that is the reason we ask for that.

RR 7:167. The Court then rejected the instruction, stating:

> And – and while I agree that the statute might be worded better, I don't find that that particular defense is supported by any evidence. And so I'll deny that request.

RR 7:167-168. This ruling was incorrect for two reasons. First, there was ample evidence in the record that Isis had black sticky stool going up into her vaginal area that had been cleaned by DeAnn on Friday evening and by Ernie at around 3 a.m. on Saturday morning. RR 4:108-111 (DeAnn) (cleaning of defecation going up into vaginal area, described by State as "massive" and "horrendous"); RR 5:196 (Officer Taylor said Ernie described having to clean rank stinky feces from vaginal area; Ernie felt sorry for child because even when he cleaned her out she still had some of the feces inside her); RR 7:93-96 (Ernie described careful cleaning of private areas). Ms. Gorday identified liquid stool that was still in the vaginal area in the sexual assault photographs (RR 5:119-120), and the State's experts agreed that such stool had to be cleaned out to avoid infection. RR 5:171-172 (Gorday); RR 6:197 (Levy). There was also undisputed evidence that Isis had a continuing diaper rash and that Ernie had treated her rash on the day she died by applying medicine to the rash. RR 7:98-99 (applied diaper medicine with finger); Ex. 57 at 18-19 (pediatrician records) (*candida* diaper rash). This evidence clearly supported a medical

care defense. Second, it was the province of the jury, *not the Court or the prosecutors*, to determine whether Isis' injuries were caused by cleaning or the application of diaper rash medication. By denying the instruction, Ernie was denied a defense that is explicitly permitted by statute.

The failure to give the medical care defense was, in the words of an appellate court in another case, "devastating." *Watrous v. State,* 842 S.W.2d 792, 795 (Tex. App.—El Paso 1992, no writ). In *Watrous,* the appellate court reversed the conviction based on counsel's failure to request a medical care defense since defendant admitted that he had tried to apply Vaseline to the child's vagina but stopped when the child complained that it hurt because his finger was too big. The failure to request a medical care defense was "so devastating" that it outweighed any other efforts of counsel, for it precluded the jury from understanding how appellant's conduct might be excused. Thus, it rendered the presentation of evidence meaningless and prevented the jury from considering a critical defense. In addition, it greatly reduced the State's burden of proof since once the issue of the existence of a defense is submitted to the jury, the court is required to charge that a reasonable doubt on the issue requires that the defendant be acquitted. TEX. PEN. CODE ANN. § 2.03(d) (Vernon 2003); *In re Winship*, 397 U.S. 358, 364 (1970) (State must prove all elements of case beyond a reasonable doubt); *Peak v. State,* 57 S.W.3d 14, 21 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (although penetration of 14-year-old's vagina to determine if she was pregnant did not appear likely to establish a medical care defense, the prosecution's repeated instructions to jury in closing argument that the jury could convict even if it found the conduct to have a medical purpose were improper since they likely confused the jury and there was no certainty of conviction absent the misconduct).

I. Prosecutorial Misconduct.

This case was further damaged by prosecutorial misconduct. A prosecutor's basic duties are set forth in an off-cited passage from *Berger v. U.S.*:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. U.S., 295 U.S. 78, 88 (1935). *See also Sizemore v. Fletcher*, 921 F.2d 667, 670-71 (6th Cir. 1990) (holding that same standards apply to state prosecutors; prosecutor's derogatory references to attorneys and references to wealth and class required grant of habeas petition since proof of guilt did not appear overwhelming). In this case, prosecutorial misconduct fell into four categories: (1) a biased investigation; (2) failure to disclose exculpatory information; (3) presentation of incorrect testimony; and (4) improper closing argument, including interjection of the prosecutor's personal opinion. Whether such misconduct creates constitutional error is subject to a harmless error analysis, viewed in the light of the totality of the circumstances, including the willfulness of the misconduct and the strength of the other evidence supporting guilt.

1. Biased Investigation. Since this has been previously discussed, suffice it to say that had the State conducted an impartial investigation, this case would never have come to trial,

because such an investigation would have reached the same conclusions as all of the reviewing experts, namely, that Isis' genital injuries were caused by some combination of diaper rash, infection, cleaning, rapid rehydration and hospital treatment, including the sexual assault examination itself, and that her death was attributable to illness, injury or infection occurring prior to arrival at the Lopez home, aggravated by dehydration and inadequate medical care.

2. Failure to Disclose Exculpatory Information. In *Brady v. Maryland,* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). In *Agurs,* the Court held that the prosecutor has the duty to disclose such evidence even if there is no request by the accused. *Agurs*, 427 U.S. at 107. This duty encompasses impeachment evidence as well as exculpatory evidence. *U.S. v. Bagley,* 473 U.S. 667, 676 (1985). The prosecutor has, moreover, a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police and social service agencies, and to disclose it if it is material. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995); *O'Rarden v. State*, 777 S.W.2d 455, 458 (Tex. App.—Dallas 1989, writ ref'd). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 443 U.S. at 682.

In this case, in the 2½ years between Isis' death and Ernie's trial, the State obtained a great deal of information indicating that Isis' death was more likely due to events occurring at the Vas home than to anything that happened at the Lopez home, let alone in the 40 minutes before the 911 call. Although the prosecutors repeatedly assured the Court that they had turned over all exculpatory information, it does not appear that the State disclosed much to defense

counsel, and that what they did disclose was disclosed at the last minute, typically on the day of trial or during trial. For example, the State never provided photographs of the child's bruises or witness statements from Dr. Shelton, even though he spoke with the prosecutors several times, each time providing information that would have been helpful to the defense. Shelton Aff., Ex. 20 at ¶¶ 37-39. While the defense learned of some of this information through Mr. Campos, we have no way of knowing what other information may have been withheld by the State. We do know, however, that the State has not yet provided the photographs taken by Sgt. Burgess (which should show the child's bruises), and that they did not disclose the medical research on child sexual abuse with which they had become familiar through the *Ramos* case and which could be used to impeach their experts. This violated two duties: the duty to provide exculpatory information, and the duty to provide material that would impeach the State's own witnesses. *See, e.g., U.S. v. Williams,* 343 F.3d 423, 439 (5th Cir. 2003) (when reliability of given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the *Brady* rule*).*

3. <u>Presentation of Incorrect Testimony</u>. By October 2000, the State knew that the medical research established that the only definitive proof of sexual assault was the presence of sperm, that abnormalities of the posterior fourchette can be caused by numerous medical conditions, including infection, and that the sexual assault nurse examiners at Northwest Texas Hospital were providing diagnoses that were inconsistent with the research and literature. They also knew that the sexual assault nurse examiners at Northwest Texas were not supervised and that, according to testimony in the *Ramos* case, the doctors at Northwest Texas were not trained in this area. Ex. 169 (b). Despite this knowledge, the prosecutors put the sexual assault nurse examiners – and Dr. Levy, who had even less knowledge of infant genitalia – on the stand to

testify to opinions and conclusions that the State knew were not only unsubstantiated but disproven by the research literature. By so doing, the prosecutors violated their duties to the Court as well as the defense. *U.S. v. Mason,* 293 F.3d 826, 828-29 (5th Cir. 2002) (due process clause forbids government from knowingly using or failing to correct false testimony; government has affirmative duty to correct false testimony).

4. Improper Closing Argument. In Texas, there are four permissible areas of jury argument: summation of the evidence, reasonable deductions from the evidence, answer to argument of opposing counsel, and a plea for law enforcement. *Mijores v. State,* 11 S.W.3d 253, 257 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In general, a defendant waives any objection to improper jury argument if counsel does not object, request an instruction to disregard, or move for a mistrial. *See, e.g., Johnson v. State*, 604 S.W.2d 128, 132 (Tex. Crim. App. [Panel Op.] 1980). However, in *Johnson*, the Court of Criminal Appeals made clear that it would not hesitate to reverse a judgment if the prosecutor engaged in conduct calculated to deny the accused a fair and impartial trial. *Id* at 135. In *Boyde v. State,* moreover, the Court held that when an objection was sustained but no further relief requested, the prosecutorial misconduct could not be viewed as harmless and required reversal if the prejudicial effect of the prosecutor's argument would not have been removed by an instruction to disregard. *Boyde v. State,* 513 S.W.2d 588, 591-93 (Tex. Crim. App. 1974); *see also Rogers v. State*, 725 S.W.2d 350, 360 (Tex. App.—Houston [1st Dist.] 1987, no writ) (notwithstanding defendant's failure to properly preserve error, prosecutor's cross-examination and side bar comments made in bad faith to inflame and prejudice jurors deprived defendant of fair and impartial trial).

a. Closing Argument: Guilt/Innocence. In this case, the prosecutors exceeded the boundaries of proper argument in two ways during the guilt/innocent phase. First, the

prosecutors misstated the evidence in their closing argument. As discussed earlier, the prosecutors continued to insist that DNA "inside" the underwear established or strongly suggested guilt even though their own experts had testified that the child's DNA was found in only a very faint quantity, consistent with transference and/or ordinary childcare. In her affidavit, Dr. Elizabeth Johnson, the DNA expert retained by Ernie's counsel, describes the testimony by the State's experts at trial. Dr. Johnson, who attended the trial, thought that the State's experts had made entirely clear that the DNA on Ernie's underwear was consistent with childcare, not sexual assault. The DNA on the first cutting (the unidentified male) was possibly transferred to the underwear at the hospital or when Mr. Lopez used a public restroom, or was deposited by the police officers who collected and handled Mr. Lopez' clothing. Isis' DNA was much lower, and was no more than what would be expected from ordinary childcare:

> Finding a low level of DNA that could have come from Isis Vas on the underwear of the defendant is not at all unusual since Mr. Lopez was involved in caring for the child. This DNA may have come from many sources such as the child's tears, saliva, urine or feces. It could have easily been transferred from Mr. Lopez' hands to his clothing after a diaper change, feeding or resuscitation. **Transfer of DNA is very common and testing techniques such as those used in this case are extremely sensitive and can detect DNA from as few as 30 cells.**
>
> The very small amount of DNA from Isis Vas on cutting 2 of Mr. Lopez' underwear is completely consistent with his contact with her as a caregiver . . . One expects . . . to find some amount of a child's DNA on his or her caregiver, even to undergarments since people may touch their own underwear whilst having the cells (and DNA) of others on their hands. In this case, the serology reports and DNA results are consistent with what one expects to find during the normal course of childcare contact, and in fact, much larger quantities of a child's DNA could be found on a caregiver through normal contact.

Johnson Aff., Ex. 6 at ¶¶ 10-11 (emphasis in original). Dr. Johnson has also reviewed the prosecutors' closing arguments, which mischaracterize the evidence provided at trial:

> I have reviewed the prosecutors' closing arguments. In their arguments, [the prosecutors] appear to be stating that finding the child's DNA on the defendant's underwear would be extremely coincidental in light of allegations of sexual

> assault, thus implying a causal connection between the presence of her DNA on the underwear and a sexual assault. *This assessment of the evidence is incorrect.* As I thought the state's witnesses made clear, the DNA result in this case is not at all inconsistent with Mr. Lopez' role as a caregiver for the child, and is not evidence of sexual assault or any other impropriety. Furthermore, the prosecutor failed to mention the significance that another cutting from the same underwear contained much more DNA, but from an unidentified person (not assumed to have been sexually assaulted) than did the cutting which contained a small amount of DNA from Isis Vas.

Id. at ¶ 17. (emphasis added).

The prosecutors also continued to claim that it is impossible that no one would have seen the trauma to the posterior fourchette, even though their own experts had testified that there was no exterior damage and that they had not noticed anything out of the ordinary until they saw a small blood spot of unknown origin when they attempted to insert a foley – a procedure that requires two nurses to hold the lips open and that is not undertaken in ordinary childcare or diaper changes. RR 7:174-175. The prosecutors also talked about "extensive bruising around the anus" even though they knew that the autopsy merely indicated "faint focal contusions" – findings that are suggestive of diarrhea, not sexual assault. RR 7:175; *see also* Affidavit of Amy Wilson, Ex. 169(c) (nurses at Northwest Texas Hospital diagnosed sexual assault even though child was brought to hospital from Perryton Hospital suffering from *E. coli*; parents were removed from hospital by police and not allowed to see daughter again until she was braindead; autopsy confirmed *E. coli,* not abuse). The description of a "very pronounced blue bruised piece of flesh that protruded" when the nurses had "barely put pressure there" is not supported by the photographs, and it is hard to imagine what the prosecutor was describing. RR 7:175.

In this closing argument, moreover, the prosecutor did not merely summarize the evidence or argue for law enforcement, but gave his personal opinion on Ernie's guilt:

> **I don't think it's beyond a reasonable doubt. I think it's beyond any doubt.** There's nobody else but Ernie Lopez. If not him, who? And the answer is – no one.

RR 7:177 (emphasis added) (continuing on to say, "And Ernest Lopez is guilty of the charges that he faces."); *see also* RR 3:78 (in voir dire, prosecutor also told jury, "When you hear the evidence, I am very confident you are going to be convinced"). Such statements of personal opinion are expressly forbidden by the Disciplinary Rules as well as the case law. *Clayton v. State*, 502 S.W.2d 755, 756-57 (Tex. Crim. App. 1973); *U.S. v. Diharre-Estrada*, 526 F.2d 637, 641, 642 (5th Cir. 1976). Statements of this nature are particularly harmful given the tendency of jurors to view prosecutors as officers of the State. *See Berger, supra.*

Third, in the closing on guilt/innocence, the prosecutor repeatedly called the alleged sexual assault a "rape" – a term that is not used in the statute and that the Court had agreed should not be used in the medical testimony. RR 6:167-168; RR 7:190 (prosecutor used "rape" five times in probably less than a minute in final closing argument). In addition, the prosecutor began to introduce fanciful theories:

> Could the object used to penetrate Isis Vas be determined? Let's criticize the police officers because they didn't find an object that they couldn't know what it looked like. Perhaps it was his penis. *Perhaps it was his hand. Perhaps it was some other – perhaps it was his fist, who knows.*

RR 7:191 (emphasis added). The prosecutor should have known, however, that it would not be physically possible for an adult penis, hand or fist to penetrate the tiny genital opening of an infant without harming the inner thighs, outer lips or hymen. The fabrication of inflammatory facts violated her duty as a prosecutor. *See, e.g., Roger*, 725 S.W.2d at 360 (prosecutor's fabrication of inflammatory facts during cross-examination improper; such zeal and indignation exceed bounds of professional propriety); *U.S. v. Rodriguez-Estrada*, 877 F.2d 153, 159 (1st Cir.

1989) (prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account).

The prosecutor then went on to address the question raised by Mr. Wilson, namely, if the child was truly sexually assaulted, wouldn't there be more DNA?

> And why didn't we find DNA on them? What would you do? If you just raped somebody? You were in your own home, and nobody's going to come until you call – what are you going to do? You answer that one, too. And when you do, you have your answers.

RR 7:191. In short, the prosecutor was suggesting, without any evidence, that in the 15 minutes between the end of Dr. Vas' phone call and the 911 call, Ernie not only prepared Isis for her bath, put her diaper in the kitchen trash tied neatly in a Wal-Mart bag, checked on the older children, tidied the kitchen, sexually assaulted Isis (whose private area has not yet been cleaned of feces, only swiped with a diaper) with great care so as not to damage the outer lips or hymen (or even disturb the feces), shook her to death *and then took a bath or shower* before starting CPR and calling 911. This is not a summary of the evidence or even a respectable theory, particularly since the police photographs show an immaculate bathroom: instead, it is simply another fabrication of inflammatory facts designed to seek a conviction, rather than justice.

The prosecutor's response to Mr. Wilson's caution that the actual injuries were magnified by showing them on a 4' by 6' screen, as well as in magnified photographs, was even less related to the facts:

> Let's blame the camera, because it didn't show you a normal size. Ladies and gentlemen, that is smaller than a normal size not larger. I didn't show them to you because they're sickening again. But you've got them. You go back and you look at them all you want to. And if you don't, I hesitate to think that you can ever forget what you've already seen. And I believe those were my words last Tuesday, also. You don't have to see them again. But nobody had to blow them up. They're smaller than that baby.

RR 7:192. Although some of this is virtually incomprehensible, two points stood out: first, that the size of the injuries somehow didn't matter (a key point for the prosecutors, since if anyone realized the actual size, they would also realize that the State's theory was physically impossible); and second, that they shouldn't look at the pictures (the primary evidence) again because they are "sickening." Without knowing whether the jurors took her recommendation, it was improper for the prosecutor to suggest that the jurors refrain from looking at the primary evidence during deliberations, particularly since a perceptive juror might well notice that there were no injuries to the inner thighs or outer lips, as one would expect had the child been sexually assaulted.

The remainder of the closing argument follows the same pattern. In an effort to cover up the inconsistencies in the E.R. personnel's timing of the alleged injuries, the prosecutor claimed that:

> We always time everything from the time a patient hits so that we know what we're talking about. That's what we do. It's from the time the patient hits the ER. Everything is timed from that. So when we answer 30 minutes, 45 minutes, an hour – it is from the time the patient entered. And that's in the hospital records.

RR 7:193. It is hard to imagine, however, that medical personnel would time every event from the time the patient entered the hospital; indeed, the logistics would seem insurmountable since not everyone would even know when the patient entered the hospital. As this suggests, the prosecutor knew that the timing given by the E.R. personnel placed the "injuries" *after* hospital admission, not before – timing that fit the pathologist's later testimony that the hemorrhages occurred within 24 hours of death – and was simply trying to obfuscate the testimony in order to get a conviction. An experienced prosecutor should also have known that hemorrhages cannot be timed by E.R. personnel, most likely at all and certainly not with the degree of precision

claimed by the prosecution. This leaves only two choices: either the prosecutor was remarkably uninformed, or she was willing to present incorrect medical evidence in order to obtain a conviction.

b. Closing Argument: Punishment Phase. The prosecution's closing arguments at the punishment phase were almost entirely based on rhetoric, rather than evidence. The evidence on cause of death was essentially ignored, possibly because it was too contradictory to summarize. The prosecution further admitted that, given Ernie's character witnesses, the jury wasn't "going to make sense of it." RR 8:134. However, according to the prosecution, "[i]f you look at the pictures, common sense tells you who had to have done it. The doctors just – and the nurses just bolstered it with expert opinion and experience." In fact, even the jurors understood that common sense did not tell them that the child had been sexually assaulted: indeed, common sense told them that the child had not been assaulted at all. *See, e.g.,* Gover Aff., Ex. 16 at ¶¶ 6-7, 17; Butler Aff., Ex. 17 at ¶¶ 9-10. The prosecutor further argued that it was "sexual in nature. How do we know that? What was assaulted? Something penetrated the sexual areas of a six-month-old child. And it resulted in her death." RR 8:136-137. What the prosecutor forgot, however, is that penetration of an infant's genitalia does not generally constitute sexual assault: instead, this is an area that requires cleaning and treatment, particularly if there is sticky stool or a diaper rash.

The final argument once again consisted of rhetoric and the fabrication of inflammatory facts. Hence:

> Did it happen in that bed? Did it happen in that one? Did it happen there? Did it happen in that bed? Did it happen in that bed or did it happen in his lap? Where the cellular material was found.

RR 8:143. This is a complete jumble of the evidence, which established that Ernie had given Isis a breathing treatment at 7 a.m., as directed by Dr. Vas, which requires placing the child in his lap – hence the skin cells on his underwear – and that the "bed" consisted of a child's crib, into which Ernie would hardly fit. The aim, however, was clear: the prosecutor was trying to use the connotation of "bed" to imply that Ernie had engaged in some type of intercourse with Isis, a claim that was directly refuted by the evidence, including the negative sexual assault examination kit and the lack of injury to the outer genitalia.

From then on, the prosecutor did not just call for law enforcement but made it personal:

> And now you're here to tell him and everybody else – you don't do it here. And if you do, we're sitting judgment. We're taking this to the bank. We're taking you, and we're taking anybody else who takes a six-month-old baby girl and rams, whatever, more than once in those places that don't heal, and takes a life – sister that won't know hers. A brother that won't know his. A mother that won't know hers.
> . . .
>
> You start high. And you go higher. I told you yesterday this case had been mine for three years. I was wrong. It was only two and a half. But this case, this file and this little girl has traveled miles with me. And I think now she will always travel with you.

RR 8:144. It would have been preferable, however, for the prosecutor to spend this time looking at the evidence, rather than asking the jury to "go higher." Ernie's sentence would be appropriate only if the evidence supported both sexual assault and shaking to death. Here, the evidence supported neither.

J. Cumulative Impact of Errors.

Some of the errors in this case are structural errors that are not subject to a harmless error analysis while others must be viewed together to determine whether they prejudiced the defense. *See, e.g., Brandley*, 781 S.W.2d at 894. Whether the errors in this case are viewed separately or together, however, there is only one possible conclusion, namely, that ineffective assistance of

counsel, a blind focus investigation, exclusion of relevant evidence, inclusion of unreliable evidence, an improperly selected and instructed jury, and prosecutorial misconduct produced a trial that lacked the elemental rudiments of fairness, in violation of Ernie's due process rights. *See id.*

VIII. CONCLUSION

As the affidavits indicate, there is no medical or other evidence suggesting that Ernie Lopez harmed Isis in any way. To the contrary, the evidence indicates that Isis died of illness, injury or infection arising before she came to the Lopez home, aggravated by dehydration and improper medical care. Her genital findings were inconsistent with abuse and mostly likely caused by some combination of diaper rash, cleaning and hospital treatment, including rehydration and an extended sexual assault examination conducted while she had a documented bleeding disorder. Ernie's trial was, moreover, marred by constitutional error, including ineffective assistance of counsel. Since Ernie was wrongfully convicted of crimes that likely did not occur at all, and that certainly were not attributable to Ernie, we respectfully request that the Court grant this petition for post-conviction relief.